Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

BEEHIVE TELEPHONE COMPANY, INC., and
BEEHIVE TELEPHONE CO., INC. NEVADA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the court of appeals violate the petitioners' due process rights when it summarily dismissed, without any statement of reasons, a petition for review that: (i) was subject to the court's jurisdiction; (ii) was filed as a matter of explicit statutory right; and (iii) presented claims under the First and Fifth Amendments?

Did the court of appeals have a duty under the Fifth Amendment to provide a statement of its reasons for departing from clearly applicable precedent to summarily dismiss a petition for review, thus depriving the petitioners of their due process right to meaningful appellate review of their constitutional claims?

Does a petition that designates for review an agency's appealable order on reconsideration suffice under Rule 15 of the Federal Rules of Appellate Procedure to permit review of the agency's underlying order, when: (i) the underlying order is identified and described in the petition for review; (ii) a copy of the underlying order is attached to the petition; and (iii) the petitioners' intent to seek review of the underlying order is clear from their contemporaneous filings?

PARTIES TO THE PROCEEDING

AT&T Corporation
Beehive Telephone Company, Inc.
Beehive Telephone Co. Inc. Nevada
Federal Communications Commission
United States of America

CORPORATE DISCLOSURE STATEMENT

Neither Beehive Telephone Company, Inc. nor Beehive Telephone Co. Inc. Nevada have a parent corporation. No publicly held company owns 10% or more of the stock of either Beehive Telephone Co., Inc. or Beehive Telephone Co. Inc. Nevada.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Beehive Telephone Company, Inc. and Beehive Telephone Co. Inc. Nevada (collectively "Beehive"), respectfully request this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia ("D.C. Circuit") summarily dismissing Beehive's petition for review of an order of the Federal Communications Commission ("FCC") prescribing rates for Beehive's interstate access services.

ORDERS BELOW

The orders of the FCC are reported at 13 F.C.C.R. 12275 ("*Investigation Order*") (App. 1a) and 13 F.C.C.R. 19396 ("*Reconsideration Order*") (App. 30a). The per curiam order without memorandum of the D.C. Circuit in No. 98-1467 is available at 1999 WL 1006310 (App. 32a). The orders of the D.C. Circuit denying Beehive's Petition for Panel Rehearing or for Rehearing En Banc appear at App. 34a and 36a.

JURISDICTION

The D.C. Circuit entered its order on October 28, 1999. The court entered orders denying Beehive's petition for panel rehearing or for rehearing en banc on April 24, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1254(1) and 2350(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . . .

The principal statutory provisions involved in this case are §§204(a), 402(a) and 405(b) of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. §§204(a), 402(a), 405(b), (App. 38a-41a); §2344 of the Hobbs Act, 28 U.S.C. §2344 (App. 42a), and §704 of the Administrative Procedure Act ("APA"), 5 U.S.C. §704. App. 44a.

Section 204(a)(1) of the Communications Act provides for agency hearings on new carrier tariff charges. §204(a)(2) provides, in relevant part:

> (2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.
>
> * * * *
>
> (C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

Section 405(a) of the Communications Act gives parties to an FCC hearing the right to petition the FCC to reconsider its decision. Section 405(b) provides:

> (b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title . . . the Commission shall issue an order granting or denying such petition.
>
> (2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

Section 402(a) of the Communications Act in turn provides:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

Section 704 of the APA provides, in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

STATEMENT OF THE CASE

Jurisdiction in the D.C. Circuit is found in §§204(a)(2)(C), 402(a) and 405(b)(2) of the Communications Act and §2342(1) of the Hobbs Act, 28 U.S.C. §2342(1) (App. 42a).

A. The FCC Hearing.

Beehive is one of the nation's smallest local exchange carriers. In less than sixteen months, the FCC held three separate hearings under §204(a) of the Communications Act to examine Beehive's filed rates for access services. The first hearing ended when the D.C. Circuit denied Beehive's petition for review on unreviewability grounds. *See Beehive Tel. Co., Inc. v. FCC,* 180 F.3d 314 (D.C. Cir. 1999) ("*Beehive I*"). This case involves the second hearing.

On June 1, 1998, the FCC concluded its second Beehive rate hearing by issuing what the D.C. Circuit generally refers to as an "investigation order." *See Southwestern Bell Tel. Co. v. FCC,* 180 F.3d 307, 309 (D.C. Cir. 1999). The FCC held Beehive's filed rates unlawful; it

prescribed a 65.9% reduction in those rates; and it ordered Beehive to refund $580,593 to its interexchange carrier customers. The FCC's decision rested in large part on its erroneous finding that Beehive's accountant had stated that the company's books had not been maintained in accordance with the agency's accounting rules. App. 12a.

Under §405(a) of the Communications Act, Beehive had to give the FCC the opportunity to correct "any error" in the *Investigation Order* as a precursor to judicial review. *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 182 (D.C. Cir. 1997). Accordingly, on June 30, 1998, Beehive petitioned the FCC to reconsider its order in part on the basis of new evidence showing that the company's books had been properly maintained.[1] On its 90-day deadline, the FCC denied Beehive's petition, giving the following reason for refusing to reconsider the matter:

> Beehive presents no new facts or arguments that would lead us to change the decisions that we made in the [Investigation] Order. We therefore affirm our decision for the reasons stated therein.

B. The D.C. Circuit Case

The filing of Beehive's petition for reconsideration with the FCC tolled the 60-day period for seeking judicial review of the *Investigation Order*, and rendered that order unreviewable as to Beehive. *See Beehive I*, 180 F.3d at 321. On October 6, 1998, the FCC released its *Reconsideration Order* which also made the *Investigation*

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[1] The D.C. Circuit suggests that a "prudent counsel" should seek FCC reconsideration if there is doubt whether the agency has been given a fair opportunity to pass on a question. *Time Warner Entertainment Co., LP v. FCC*, 144 F.3d 75, 81 n.7 (D.C. Cir. 1998).

Order reviewable. Eight days later, Beehive filed its petition for review with the D.C. Circuit.

Beehive petitioned the court to review the FCC's order "entered September 28, 1998, by which it denied Beehive's petition for reconsideration of an FCC order, entered June 1, 1998, prescribing rates that Beehive could charge for access service, and directing Beehive to make refunds for revenues obtained between January 1, 1998, and the effective date of the tariff[] filed in response to the June 1, 1998 order." In a footnote, Beehive provided the citation to the *Investigation Order.* Beehive attached copies of both the one-page *Reconsideration Order* and the fourteen-page *Investigation Order* to its petition.

Beehive filed its preliminary statement of issues with the court on November 6, 1998. Five of those issues related exclusively to the lawfulness or constitutionality of the *Investigation Order.* The remaining issue concerned the unsupported findings contained in that order and the FCC's refusal to reconsider them.

Beehive subsequently listed the *Investigation Order* in its certificate as to the rulings under review. All six of the arguments in Beehive's initial brief were directed exclusively or primarily to the *Investigation Order.* Included among these were claims that the FCC violated Beehive's Fifth Amendment due process rights to notice and a fair hearing and that the FCC's disallowance of all of Beehive's legal expenses (including expenses incurred in litigation where the FCC was an adverse party) had a chilling effect on the exercise of its First Amendment right to petition.

The D.C. Circuit gave the FCC until November 23, 1998 to file dispositive motions, but the agency did not

move for dismissal of Beehive's petition for review. The FCC later, however, argued in its brief that the petition should be dismissed because Beehive failed to "specify" a reviewable order. The FCC contended that the D.C. Circuit strictly construes Rule 15(a) of the Federal Rules of Appellate Procedure to bar review of orders not properly designated in the petition for review, even ones issued in the same administrative proceeding. According to the FCC, Beehive's petition asked only for review of the *Reconsideration Order*, which the agency contended was unreviewable under *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987) ("*BLE*").

Beehive countered that *BLE* did not address whether a petition for review complies with Rule 15(a). Beehive pointed out that when it filed its petition, Rule 15(a) only required it to "designate" the order to be reviewed. FED. R. APP. P. 15(a) (1998) (amended December 1, 1998). App. 46a. It argued its petition was at least the functional equivalent of what Rule 15(a) required, and that was all that was necessary under this Court's liberal construction of the rule. Because the Hobbs Act simply requires a petitioner to attach a copy of the agency order to its petition for review, *see* 28 U.S.C. §2344, Beehive reasoned that its attachment of the *Investigation Order* to its petition sufficed under Rule 15(a) to designate the order for review. Citing *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 889 & n.73 (D.C. Cir. 1987), Beehive asked that any mistake in designating the *Investigation Order* be excused, because it was clear Beehive intended to seek review of that order and the FCC had not been misled or prejudiced in any way.

On June 25, 1999, the D.C. Circuit decided both *Southwestern Bell* and *Beehive I*. In *Southwestern Bell*, the court applied the test developed in *Nichols* and

Brookens v. White, 795 F.2d 178, 180 (D.C. Cir. 1986) to decide whether a petition for review that names only an FCC reconsideration order suffices to bring the underlying investigation order up for review. The court held that a mistake in designating an order should not result in loss of the appeal as long as: (1) the petitioner's intent to seek review of the order "can be fairly inferred either from [its] petition for review or its subsequent filings," and (2) the respondent was not prejudiced by the mistake. *Southwestern Bell*, 180 F.3d at 313.

In *Beehive I*, the court held that §§402(a) and 405(b)-(2) of the Communications Act gave it jurisdiction over a petition for review which sought review only of a reconsideration order and was filed in conformity with the Hobbs Act. *See* 180 F.3d at 319.[2] However, the court held that *BLE* governs the reviewability of the reconsideration order. *See id.* Thus, the reconsideration order would be reviewable only if Beehive's petition for FCC reconsideration "alleged new evidence or changed circumstances." *Id.*

Because Beehive only petitioned the court to review the reconsideration order, the decision in *Beehive I* did not address Rule 15(a) requirements or decide the issue presented here. This case turns in part on whether Beehive's petition for review met the requirements of Rule 15(a) to permit review of the underlying *Investigation Order*.

Southwestern Bell and *Beehive I* were decided after briefing was completed in this case. Beehive and the FCC recognized the *Southwestern Bell* test applied here,

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[2]The D.C. Circuit subsequently disapproved the *Beehive I* panel's treatment of *BLE* nonreviewability as nonjurisdictional. *See Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 313 n.** (D.C. Cir. 2000).

and they submitted supplemental briefs discussing the test and *Beehive I.* Both parties filed unopposed motions for leave to file their supplemental briefs. The court granted the FCC's motion and lodged its supplemental brief. Beehive's motion was denied. App. 33a.

The D.C. Circuit scheduled oral argument in this case for October 28, 1999. Less than two weeks before it was to hear the argument, the court ordered that the case be decided on the briefs. Finding no need for an opinion or a memorandum, the court issued a per curiam order on October 28, 1999 dismissing Beehive's petition. A citation to "Beehive Telephone Co., Inc. v. FCC (D.C. Cir. 1999)" provided the only explanation for the court's decision. App. 33a.

When it sought rehearing, Beehive advised the court that the FCC was investigating whether Beehive's financial integrity was in jeopardy,[3] and that the summary dismissal of its petition for review will cause it to suffer a serious financial blow. Beehive suggested the abbreviated disposition of its case was inconsistent with precedent and inappropriate under the circumstances. Beehive asked the court at least to provide some explanation why it dismissed a petition for review that was subject to its jurisdiction and filed as a matter of statutory right.

Beehive's request for rehearing was pending before the D.C. Circuit more than four months. During that time, Beehive brought to the court's attention two cases in which an FCC reconsideration order was designated in the notice of appeal, but the court applied the *Southwestern Bell* test and found an intent to appeal the underlying FCC decision. *See Schoenbohm v. FCC,* 204 F.3d

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[3] *See Beehive Tel. Co., Inc.,* 14 F.C.C.R. 8077, 8077-78 (1999).

243, 245-46 (D.C. Cir 2000); *Damsky v. FCC*, 199 F.3d 527, 532-33 (D.C. Cir. 2000). Nevertheless, the court refused to rehear the case, leaving Beehive at a loss to understand why its right to judicial review was denied.

REASONS FOR ALLOWANCE OF THE WRIT

A right to hear why is triggered when a due process right to be heard is denied. In our society, citizens given a statutory right of access to appellate courts to protect fundamental interests are entitled to an explanation when the door to an appeals court is slammed in their face. In such circumstances, a court owes the losing litigant an explanation, not only as a check on arbitrary decisionmaking, but out of the respect due those entitled to their day in court.

Filed as matter of explicit statutory right, Beehive's timely petition for review was *dismissed* by the D.C. Circuit without any statement of reasons beyond an incomplete citation, presumably to a wholly unrelated case. The court's unexplained action constitutes a seemingly arbitrary refusal to exercise jurisdiction conferred on it to review colorable constitutional claims. The court of appeals so far departed from the dictates of due process, and its duty as an Article III court, as to call for an exercise of this Court's supervisory power.

I.

THE D.C. CIRCUIT VIOLATED THE FIFTH AMENDMENT BY ARBITRARILY DEPRIVING BEEHIVE OF ITS DUE PROCESS RIGHT TO JUDICIAL REVIEW OF THE *RECONSIDERATION ORDER*.

This Court has said there is no constitutional right to appeal, *Jones v. Barnes*, 463 U.S. 745, 751 (1983), and that the right is purely a creation of statute. *Abney v. United States*, 431 U.S. 651, 656 (1977). However, when a legislature affords a right to appeal a deprivation of life, liberty or property, the procedures used in deciding those appeals must comport with the demands of the Due Process Clause. *See Smith v. Robbins*, 120 S.Ct. 746, 759 (2000); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The same is true when Congress confers a right of judicial review on persons deprived of property. Moreover, a statutory right of access to the courts to redress a deprivation of property interests is itself a "species of property" protected by the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Thus, the federal government cannot arbitrarily deny a petitioner use of a congressionally created right of access to the appellate courts. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). Nor can a court of appeals. But that is what the D.C. Circuit inexplicably did below.

Beehive was entitled to judicial review of the FCC's rate prescription and refund order under the explicit terms of §§204(a)(2)(C) and 405(b)(2) of the Communications Act. Congress added those two provisions to the Communications Act in 1988[4] to "protect the petition-

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[4] Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, § 8, 102 Stat. 3021, 3023 (1988) ("1988 FCC Authorization Act").

er's due process right to judicial review"[5] by insuring that any FCC order concluding a rate hearing under §204(a) will be "subject to judicial review under the appropriate standards governing review of agency decisions."[6] By providing that "any order" concluding a rate hearing "may be appealed" under the Hobbs Act, §§204 (a)(2)(C) and 405(b)(2) entitled Beehive to judicial review of the *Investigation Order* and the *Reconsideration Order*. *See* 5 U.S.C. §702. App. 44a.

Beehive's petition for review clearly implicated protected property interests. First, Beehive has a statutory right to collect just and reasonable charges pursuant to rates filed with the FCC for interstate telecommunications services. *See* 47 U.S.C. §§201(b), 203. Second, the constitution protects Beehive's rights to charge a reasonable rate for its property serving the public, *see Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989), and to retain previously collected charges. *See Ohio Bell Tel. Co. v. PUC of Ohio*, 301 U.S. 292, 304-306 (1937). Those property rights were adversely affected by the FCC's prescription of lower rates for Beehive's access services and by the agency's order that Beehive refund collected access charges.

Having exercised its statutory right of access to a court of appeals to defend its protected property interests, Beehive was entitled to "effective judicial review," *Proctor v. Warden, Md. Penitentiary*, 435 U.S. 559, 559 (1978), including the minimum safeguards required by due process to make for meaningful review. *See Evitts*, 469

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[5] 134 CONG. REC. 10,452 (1988) (statement of Rep. Markey).

[6] *Id.* at 10,453, *reprinted in*, 1988 U.S.C.C.A.N. 4111, 4114 (statement of Sen. Inouye).

U.S. at 393-94. At the very least, Beehive was entitled to be given an "opportunity to be heard" on the merits of its case. *Boddie v. Connecticut*, 401 U.S. 371, 378-80 (1971). In that sense, Beehive's due process right to review served to heighten the D.C. Circuit's already "strict duty" to exercise the jurisdiction Congress conferred on it. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). Nevertheless, the D.C. Circuit gave Beehive no opportunity to be heard on the merits of its claims.

The D.C. Circuit dismissed Beehive's petition for review out of hand, never reaching the merits. To show cause for denying Beehive judicial review, the court said nothing more than "[s]ee Beehive Telephone Company, Inc. v. FCC (D.C. Cir. 1999)." We assume the court alluded to *Beehive I*.[7] In the absence of any other plausible explanation, we also assume the D.C. Circuit dismissed the petition for review for want of jurisdiction. In that case, *Beehive I* cannot be cited as governing authority. Before it could declare the *Reconsideration Order* unreviewable as in *Beehive I*, the D.C. Circuit had to determine whether the evidence Beehive submitted in support of its petition for reconsideration constituted "new evidence" under *BLE*. *See Beehive I*, 180 F.3d at 319-20. *See also Jost v. Surface Transportation Bd.*, 194 F.3d 79, 84-85 (D.C. Cir. 1999). But even if it determined that the *Reconsideration Order* was unre-

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[7] Beehive was the petitioner in three cases decided by the D.C. Circuit in 1999. In addition to *Beehive I*, the court dismissed in part Beehive's petition for review of the FCC's decision in its third hearing on Beehive's rates. *See Beehive Tel. Co., Inc. v. FCC*, No. 99-1130 (D.C. Cir. July 28, 1999). In an unrelated rulemaking case, Beehive's petition for review was dismissed in part and denied in part by the D.C. Circuit. *See Beehive Tel. Co., Inc. v. FCC*, 179 F.3d 941, 946 (D.C. Cir. 1999).

viewable, which would have necessitated findings based on the record in this case, the court would still have jurisdiction to review the *Investigation Order.* In short, judicial review on the merits was required.

Once again, there is a crucial difference between *Beehive I* and this case. In the prior case, Beehive intended to appeal the reconsideration order and felt no need to argue that it also designated the underlying investigation order for review. Consequently, the D.C. Circuit in *Beehive I* was not called upon to decide, and consequently did not decide, whether Beehive's petition for review gave it jurisdiction to review the investigation order. That is the overriding issue here. Beehive intended to appeal both the *Investigation Order* and the largely inconsequential *Reconsideration Order,* and it argued strenuously that both orders were designated for review in compliance with Rule 15(a). If that is so, the D.C. Circuit had jurisdiction over both orders.

We wish to make plain our view that *Beehive I* was wrongly decided by the D.C. Circuit (which unfortunately could explain the court's refusal to state its reasons in this case). *BLE* was decided by this Court in 1987. A year later, *BLE* was legislatively overruled, as it applied to rate regulation under the Communications Act, by the 1988 FCC Authorization Act. Congress explicitly made any reconsideration order in a §204(a) hearing reviewable. Because of that, any thought after 1988 that such a reconsideration order was unreviewable under the APA flies in the face of the text of §405(b)-(2) of the Communications Act and §704 of the APA. A reconsideration order made reviewable explicitly by §405(b)(2) is obviously an "[a]gency action made reviewable by statute" which is subject to judicial review

under the APA. 5 U.S.C. §704. By the same token, a reconsideration order subject to judicial review under APA §704 cannot rationally be considered an agency action "committed to agency discretion by law" and therefore unreviewable under the APA. 5 U.S.C. §701-(a)(2) (App. 44a).[8]

When it exercised its right to appellate review under the Communications Act and the APA, Beehive had the due process right to the level of judicial review the APA required. *See* 5 U.S.C. §706 (App. 45a). The D.C. Circuit was required to decide, for example, whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* §706(2)(A), for the FCC to refuse to correct a material error in its *Investigation Order* when given the opportunity by Beehive as a precursor to judicial review. *See* 47 U.S.C. §405(a) (App. 40a). The D.C. Circuit's unexplained refusal to decide such questions violated its duty under the APA. *See* 5 U.S.C. §706 ("when presented, the reviewing court *shall* decide all relevant questions of law") (emphasis added).

The D.C. Circuit was obliged to perform its statutory duty to review the *Reconsideration Order* upon Beehive's proper request. Its refusal to do so defies explanation. By its own standards, the D.C. Circuit's denial of Beehive's statutory right to judicial review by an *ipse dixit* conclusion "epitomizes arbitrary and capricious decision-making." *Illinois Public Telecomms. Ass'n. v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997). The D.C. Circuit arbi-

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[8]The statutory commands that the FCC "shall" issue a final, appealable order within 90 days disposing of a petition for reconsideration, 47 U.S.C. §405(b)(1), and "shall" provide a concise statement of its reasons for its disposition, *id.* §405(a), do not commit such action to the FCC's discretion. *See Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986).

trarily and inexcusably deprived Beehive of protected rights in violation of the Due Process Clause and its duties as an Article III court.

II.

FED R. APP. P. 15(a) AND D.C. CIRCUIT RULE 36(B) ARE UNCONSTITUTIONAL AS APPLIED TO ARBITRARILY DEPRIVE BEEHIVE OF ITS DUE PROCESS RIGHT TO JUDICIAL REVIEW OF THE *INVESTIGATION ORDER*.

The Due Process Clause requires procedures to ensure that the right to judicial review conferred by Congress is not arbitrarily denied through the application of an appellate rule. *See Evitts*, 469 U.S. at 404-05. The D.C. Circuit's abbreviated disposition of this case under its Rule 36(b) masked an unconstitutional denial of Beehive's right to judicial review of the *Investigation Order* under §204(a)(2)(C) of the Communications Act.

Local Rule 36(b) permits the D.C. Circuit to "dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate." D.C. CIR. R. 36(b) (App. 47a). As applied in this case, Rule 36(b) excused the court from providing any written statement of its reasons, a task that traditionally serves to prevent "arbitrary action by those having the awesome power of almost final review." *NLRB v. Amalgamated Clothing Workers of America, Local 990*, 430 F.2d 966, 972 (5th Cir. 1970). Thus, the court relieved itself of "the single most important restraint on the decisions of judges." *Coalition to End the Permanent Congress v. Runyon*, 979 F.2d 219, 221 (D.C. Cir. 1992) (Silberman, J., dissenting). Undoubtedly, the D.C. Circuit "need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit. This, however, was not

the situation presented here." *Sumner v. Mata*, 449 U.S. 539, 548 (1981). To the contrary, the D.C. Circuit appeared to strictly enforce Rule 15(a) in conflict with *Southwestern Bell*, the decisions of this Court, and core requirements of due process.

Beehive insisted that its petition for review complied with Rule 15(a) and thus gave the D.C. Circuit jurisdiction to review the *Investigation Order*. The petition specifically identifies the *Investigation Order* (by citation), describes it (as prescribing Beehive's rates and directing Beehive to make refunds), and gives its date of entry (June 1, 1998). Moreover, the *Investigation Order* is attached to the petition. Beehive maintained that was enough under this Court's liberal construction of Rule 15(b), because the petition for review is at least the "functional equivalent" of what the rule requires. *Smith v. Barry*, 502 U.S. 244, 248 (1992); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988). As Beehive argued and the D.C. Circuit recognized in *Entravision*, a petitioner need only attach a copy of the order to its petition to designate it for review under §2344 of the Hobbs Act. *See* 202 F.3d at 314.

Even if it did not meet the liberally construed requirements of Rule 15(a), Beehive's petition for review was sufficient to sustain its due process right to judicial review of the *Investigation Order*. Because the exercise of that right turned on Beehive's compliance with Rule 15(a), the D.C. Circuit was obliged to read the rule in light of Beehive's due process right of access, and to recognize the constitutional limitations on its power to dismiss Beehive's petition. *See Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 209 (1958). It is apparent from the dismissal order that

the D.C. Circuit did not construe Rule 15(a) most favorably to Beehive as required by the Fifth Amendment. The court's citation to *Beehive I*, a case wholly unrelated to Rule 15(a), suggests it gave no consideration to the constitutional implications of its action.

What we find most distressing is the D.C. Circuit's unexplained failure to apply the *Southwestern Bell* intent-to-appeal test. Under that test, any inexactness in the designation of the *Investigation Order* would not be fatal if Beehive's intent to appeal from that order " 'can be fairly inferred' from the petition or documents filed more or less contemporaneously with it." *Martin v. FERC*, 199 F.3d 1370, 1372 (D.C. Cir. 2000) (quoting *Southwestern Bell*, 180 F.3d at 313). But the D.C. Circuit did not follow *Southwestern Bell* despite the urging of both parties.

Subsequent decisions of the D.C. Circuit create the appearance that the court's treatment of Beehive was unduly harsh and unprincipled. During the four months Beehive's petition for rehearing was before it, the D.C. Circuit decided five cases in which an agency denied reconsideration of a substantive decision and the party appealed only the order denying reconsideration. In each case, the court adhered to *Southwestern Bell* and applied the intent-to-appeal test to determine whether the earlier substantive decision was reviewable. *See City of Oconto Falls, Wis. v. FERC*, 204 F.3d 1154, 1160 (D.C. Cir. 2000) (intent to seek review shown by description of underlying order in petition for review and by identifying and addressing order in brief); *Schoenbohm*, 204 F.3d at 245-46 (intent to appeal fairly inferred from the required "concise statement of reasons" filed with notice of appeal); *Entravision*, 202 F.3d at 314 (intent to seek review could not be fairly inferred when underlying

order was not attached to petition for review nor identified in docketing statement or statement of issues); *Martin*, 199 F.3d at 1372-73 (intent to seek review inferred from motion to stay and indicated in subsequent docketing statement and certificate as to rulings under review); *Damsky*, 199 F.3d at 533 (intent inferred from citation to underlying order in notice of appeal and concise statement of reasons).

Counting *Southwestern Bell*, there were seven cases decided by the D.C. Circuit in relatively short order which called for an application of the *Southwestern Bell* test. Only this case was decided without use of the test. Had the test been applied, the court almost certainly would have deemed the *Investigation Order* reviewable. Beehive's petition for review, the attachment of the *Investigation Order*, and its contemporaneous filings provided ample evidence of its intent to appeal the *Investigation Order*, and more than enough evidence to sustain its due process right to judicial review.

The D.C. Circuit, which requires agencies to state their reasons as a safeguard against arbitrary decisionmaking, is not exempt from the same duty. *See MaGee v. United States*, 462 F.2d 243, 247 (2nd Cir. 1972) (Friendly, C.J.). The court's failure to apply the clearly applicable *Southwestern Bell* test is no less arbitrary than the unexplained departures from agency precedent that the court often remands for a reasoned explanation. *See, e.g., Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994). Hence, Beehive was "entitled to a complete explanation of [the D.C. Circuit's] apparent disregard of precedent." *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091, 1092 (4th Cir. 1972). It received no explanation. The resultant appearance of arbitrariness makes this case one of the exceptional occasions when an

explanation of the court's reasons is required by the demands of due process. *See Harris v. Rivera*, 454 U.S. 339, 344 (1981).

This Court has recognized that a statement of the decisionmaker's reasons is a basic requirement of due process. *See Wolff*, 418 U.S. at 564-65; *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Beehive in turn was entitled to the minimum due process procedures necessary to make its appeal of right more than a "meaningless ritual." *Evitts*, 469 U.S. at 393-94. When the D.C. Circuit dismissed Beehive's appeal, the only remaining due process protection the court could afford was to provide a written statement of its reasons. Without the court's reasoning, Beehive's appeal of right amounted to nothing more than the right to have its appeal dismissed and be left with the impression that it was denied due process and equal treatment under the law.

The idea that the D.C. Circuit could deny what was due Beehive by statute, and do so without explanation, offends the "notions of what is fair and right and just" that are at the core of due process. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting). To remedy that injustice, and prevent its reoccurrence, this Court should hold that a statutory right to judicial review of an agency action comprehends a corresponding duty of the reviewing courts to write at least a brief statement of the reasons for their decisions. A brief statement of reasons, not amounting to a full opinion, can be provided at little cost in judicial efficiency, and will protect losing parties from the humiliation of having an appeal of right rejected by an unexplained and seemingly arbitrary exercise of judicial power.

III.

BECAUSE IT IS APPARENT THAT EFFECTIVE APPELLATE REVIEW WAS NOT ACCORDED BEEHIVE, THE COURT SHOULD GRANT THIS PETITION, VACATE THE ORDER BELOW, AND REMAND THIS CASE TO THE D.C. CIRCUIT FOR FURTHER CONSIDERATION.

In *Proctor v. Warden, Md. Penitentiary*, a state prisoner exercised his statutory right to appellate review of the dismissal of his petition for a writ of habeas corpus by a district court. The court of appeals affirmed the district court by a per curiam order that was directed to a case "wholly unrelated" to that of the prisoner. *Proctor*, 435 U.S. at 560. This Court summarily granted certiorari and remanded the case for further consideration, because it appeared that "effective appellate review may not have been accorded" the petitioner. *Id.* at 559. "[I]t is not enough that a just result may have been reached," the Court explained, "justice must satisfy the appearance of justice." *Id.* at 560 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The parallel between *Proctor* and the case at bar is striking. Beehive was exercising its statutory right to appellate review; its petition for review was summarily dismissed by a per curiam order; and it is apparent from the D.C. Circuit's citation of *Beehive I* as governing precedent that effective appellate review was not provided. As we discussed, *Beehive I* has no bearing on any issue in this case that would subject Beehive's petition for review to dismissal out of hand. As also discussed, the court's failure to state its reasons and adhere to precedent gives its dismissal of Beehive's appeal of right the appearance of arbitrariness, not justice.

Under the special circumstances of this case, the Court may not wish to impute to the D.C. Circuit reasoning that would raise substantial due process issues. *See Taylor*

v. McKeithen, 407 U.S. 191, 194 n.4 (1972). Nevertheless, it is obvious that the court did not provide effective judicial review below. Accordingly, we suggest that the Court grant this petition, vacate the dismissal order, and remand this case to the D.C. Circuit for further consideration. *See Proctor*, 435 U.S. at 560; *Taylor*, 407 U.S. at 196.

IV.

THE D.C. CIRCUIT'S STRICT "DESIGNATE-ALL-ORDERS" RULE CONFLICTS WITH THIS COURT'S LIBERAL CONSTRUCTION OF RULE 15(a) AND DECISIONS OF THE MAJORITY OF THE CIRCUITS.

The FCC urged the D.C. Circuit in this case to follow the strict interpretation of Rule 15(a) applied in *John D. Campanos & Sons, Inc. v. FDA*, 854 F.2d 510 (D.C. Cir. 1988). There, the court adopted what we refer to as a "designate-all-orders" rule, under which a petition for review designating one order in a proceeding is not adequate under Rule 15(a) to obtain review of any other order that was part of the same administrative record. *See* 854 F.2d at 527. The D.C. Circuit has acknowledged that its strict interpretation of Rule 15(a) conflicts with that of the Fifth Circuit. *See City of Benton v. NRC*, 136 F.3d 824, 826 (D.C. Cir. 1998). The Fifth Circuit holds that "an appeal from a final judgment sufficiently preserves all prior orders intertwined with the final judgment." *Trust Co. of La. v. N.N.P. Inc.*, 104 F.3d 1478, 1485 (5th Cir. 1997). *See New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 884 (5th Cir. 1998). The Fifth Circuit's approach is consistent with decisions of the Second, Sixth, Eighth, Ninth, and Tenth Circuits under which a notice of appeal designating only an order deny-

ing reconsideration of a judgment perfected an appeal of the undesignated judgment.[9]

The D.C. Circuit's designate-all-orders rule is at odds with this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962). In *Foman*, the petitioner appealed both the judgment of the district court and the court's subsequent denial of her motion to vacate. *See* 371 U.S. at 179. The first notice of appeal was premature, because of the pending motion to vacate. Nevertheless, this Court held that the second notice of appeal from the denial of the motion to vacate, which did not reiterate that the underlying judgment was being appealed, should be treated as "an effective, although inept, attempt" to appeal the underlying judgment. *Id.* at 181. Taking the two notices together, the petitioner's intention to seek review of the substantive decision was manifest. *See id.*

Like the petitioner in *Foman*, Beehive challenged two actions in the same proceeding. Two decisions of the district court over the course of one month were appealed in *Foman*. *See id.* at 179. Here, Beehive seeks review of two orders of the FCC issued less than four months apart. However, unlike the petitioner in *Foman*, Beehive identified and described both orders in its petition for review and attached copies of both orders to the petition. If the intent to appeal two orders was manifest to this Court in *Foman*, it should have been even more so to the D.C. Circuit below.

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[9] *See Artes-Roy v. City of Aspen*, 31 F.3d 958, 961 n.5 (10th Cir. 1994); *Lowrance v. Achtyl*, 20 F.3d 529, 534 (2d Cir. 1994); *Flieger v. Delo*, 16 F.3d 878, 882 (8th Cir. 1994); *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979); *Peabody Coal Co. v. Local 1734, United Mine Workers*, 484 F.2d 78, 81-82 (6th Cir. 1973).

We ask this Court to bring the D.C. Circuit in line with *Foman* and the majority of the circuits by holding that the designation of the *Reconsideration Order* suffices under Rule 15(a) to obtain review of the underlying *Investigation Order*, since Beehive's intention to appeal both orders is manifest. Such a holding would be consistent with the rulemakers' intent that Rule 15(a) not limit a court's jurisdiction, *see* FED. R. APP. P. 1(b), nor cause manifest injustice. *See* FED. R. APP. P. 2 advisory committee note.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[FCC 98-105]

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 97-249
Beehive Telephone Company, Inc.	)	
Beehive Telephone, Inc. Nevada	)	
Tariff F.C.C. No. 1	)	Transmittal No. 8
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1998 Released: June 1, 1998

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we conclude our investigation of Transmittal No. 8 filed on December 17, 1997 by Beehive Telephone Company, Inc. and Beehive Telephone, Inc. of Nevada (collectively "Beehive"). We find that Beehive has failed to meet its burden of proof under Section 204(a)(1) of the Communications Act (Act), 47 U.S.C. §204(a)(1), to justify its proposed interstate traffic sensitive switched access rates that are the subject of this investigation: premium and non-premium local switching, local transport facility,

and local transport termination charges.[1] We further find for the reasons discussed below that we are unable to rely on supporting information submitted by Beehive for the purpose of prescribing rates. We, therefore, prescribe rates for these services using a methodology based on industry averages for comparably sized companies. We direct Beehive to refund to its customers, with interest, the difference between our prescribed rates and the rates filed in December, 1997.

II. BACKGROUND

2. Prior to 1994, Beehive charged interstate local switching and transport rates filed by the National Exchange Carrier Association (NECA) on behalf of incumbent local exchange carriers (LECs) that participate in NECA's traffic-sensitive access tariff. In 1994, Beehive established its own interstate access rates pursuant to Section 61.39 of the Commission's rules,[2] which permits a LEC that qualifies as a small telephone company to file its own tariff for traffic sensitive interstate access

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[1] Beehive's tariff does not use terms specifically set out in Section 69.111 of the Commission rules, 47 C.F.R. §69.111, concerning tandem-switched transport transmission charges. 47 C.F.R. §69.111(a)(1). Sections 69.111(e)(1)(i) and (ii) of the rules, 47 C.F.R. §§69111(e)(i) and (ii), provide that, through June 30, 1998, if the company employs distance sensitive rates, a distance sensitive component shall be assessed for the use of transmission facilities and a non-distance-sensitive component shall be assessed for use of the circuit equipment at the ends of the interoffice transmission links. Beehive's description of its offerings as "local transport facility" and "local transport termination" charges appear to be consistent with the rate structure requirements of Sections 69.111(e)(1)(i) and (ii) of the rules because the "local transport facility" charge includes a distance sensitive component and because the "local transport termination" charge is non-distance sensitive.

[2] 47 C.F.R. §61.39.

charges under more simple rules than those that apply to larger carriers.[3] This methodology generally permits qualifying LECs to base their rates for the next two access tariff years on their actual costs and demand during the previous two calendar years.

3. On July 22, 1997, Beehive filed Transmittal No. 6, which proposed the rates, terms, and conditions under which Beehive would offer interstate access service for the 1997-1999 access years.[4] The Common Carrier Bureau suspended Beehive's tariff filing on August 5, 1997 concluding that it raised significant questions of lawfulness, including whether the proposed rates were unreasonably discriminatory in violation of Section 202(a) of the Act; whether the proposed rates were unjust and unreasonable in violation of Section 201(b) of the Act; and whether Beehive had shown that its proposed traffic sensitive switched access rates were justified under the existing interstate access charge rules.[5]

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[3] Small telephone companies are defined as those carriers with fewer than 50,000 access lines that also are part of NECA Subset 3, as defined by Section 69.602(a)(3) of the rules, 47 C.F.R. §69.602(a)(3). *See Regulation of Small Telephone Companies*, CC Docket No. 86-467, Report and Order, 2 FCC Rcd 3811 (1987).

[4] Beehive Access Tariff FCC No. 1, Transmittal No. 6, CC 97-237 (filed, July 22, 1997) (Transmittal No. 6). AT&T filed a petition urging the Commission to reject, or alternatively, to suspend and investigate Beehive's Transmittal No. 6 and alleged that Beehive's premium local switching rate was excessive. *See* AT&T Petition to Suspend and Investigate and for Rejection of Beehive Transmittal No. 6, CC 97-237 (filed, July 20, 1997). Beehive filed an opposition on August 4, 1997. *See* Beehive Reply to AT&T's Petition to Suspend and Investigate and for Rejection, CC 97-237 (filed, August 4, 1997).

[5] Beehive Telephone Company, Inc., Tariff F.C.C. No. 1, Transmittal No. 6, CC Docket No. 97-237, Suspension Order, DA 97-1674 (Com. Car. Bur. Comp. Pric. Div., rel. August 5, 1997).

4. On January 6, 1998, we released the *Beehive Tariff Investigation Order*,[6] concluding our investigation of the rates filed by Beehive in its 1997 annual access tariff. We found that Beehive had failed to provide an adequate explanation for the sharp increases in its operating costs in 1995 and 1996 and that its premium and nonpremium local switching rates were unjust and unreasonable.[7] In that order, we disallowed Beehive's operating expenses in excess of 25 percent of its total plant in service (TPIS) and prescribed rates for Beehive's premium and non-premium local switching services.[8] We calculated the average ratio of operating expenses to total plant in service among companies with a comparable number of access lines to Beehive in 1995 or 1996 using data filed with NECA.[9] We found that the average total operating expense to total plant in service ratio among LECs with a comparable number of access lines as Beehive was 21.55 percent. To account for the possibility that Beehive is a high cost carrier, we used an expense to total plant in service ratio of 25 percent.[10] We also directed Beehive to refund the difference between the actual local switching revenues that it obtained between August 6, 1997 and December 31, 1997 and the local switching revenues that

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[6] In the Matter of Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, Transmittal No. 6, CC Docket 97-237, Memorandum Opinion and Order, FCC 98-1 (released January 6, 1998) (*Beehive Tariff Investigation Order, Transmittal No. 6).*

[7] *Beehive Tariff Investigation Order, Transmittal No. 6* at 6, 7 (paras. 14, 16).

[8] *Beehive Tariff Investigation Order, Transmittal No. 6* at 10 (para. 25).

[9] *Beehive Tariff Investigation Order, Transmittal No. 6* at 7 (para. 18).

[10] *Beehive Tariff Investigation Order, Transmittal No.* at 7 (para. 8).

it would have obtained during this period based on the rates prescribed by the Commission. Beehive filed a petition for reconsideration of the *Beehive Tariff Investigation Order* on February 5, 1998 seeking reconsideration of the rate prescriptions and the refund requirements. On May 6, 1998, we released the *Beehive Reconsideration Order*, which generally denied Beehive's petition in part but found that we should have used Beehive's total 1995/1996 interstate premium and non-premium access minutes.[11]

5. On December 17, 1997, Beehive Telephone Company, Inc. and Beehive Telephone, Inc. of Nevada (collectively "Beehive") filed Transmittal No. 8, which proposed to revise its interstate access service rates in accordance with the Commission's *Access Charge Reform Order*.[12] Beehive's Transmittal No. 8 proposes per minute switching rates of $0.028252 for premium local switching and $0.01815 for non-premium local switching.[13] Beehive also proposes to reduce its local transport facility rates by approximately 20 percent, and to raise its local transport termination rates by approximately 50 percent.

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[11] Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, CC Docket No. 97-237, Order on Reconsideration, FCC 98-83 at 3 (released May 6, 1998) (para. 5).

[12] *Access Charge Reform Order*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Charge Reform Order*). On December 23, 1997, AT&T Corp. (AT&T) filed a petition to suspend and investigate Beehive's tariff. *See* Petition of AT&T Corp. on Rate of Return LEC Tariff Filings at 6 (filed December 23, 1997) (AT&T Petition). On December 29, 1997, Beehive filed a response to AT&T's petition. *See* Letter from Russell D. Lukas, Attorney for Beehive, to Magalie Roman Salas, FCC, dated December 29, 1997 *(Beehive Reply)*.

[13] Beehive Access Tariff FCC No. 1, Transmittal No. 8 (December 17, 1997)(*Transmittal No. 8)*.

6. On December 23, 1997, AT&T filed a petition requesting that the Commission suspend and investigate Beehive's Transmittal No. 8, alleging that Beehive had failed to provide supporting documentation with its filing and failed to justify the rates proposed.[14] Beehive submitted additional cost support with its reply to AT&T's opposition and urged the Commission to deny AT&T's request, alleging that Beehive had been prejudiced by AT&T's failure to serve Beehive with AT&T's opposition in a timely manner.[15] On December 30, 1997, the Competitive Pricing Division of the Common Carrier Bureau (Bureau) suspended Beehive's Transmittal No. 8 for one day, initiated an investigation into the lawfulness of this tariff filing, and imposed an accounting order.[16]

7. On March 13, 1998, the Bureau released the *Beehive Designation Order*, designating for investigation whether Beehive's premium and non-premium local transport facility, local transport termination, and local switching rates filed in Transmittal No. 8 are just and reasonable. The Bureau directed Beehive to file additional supporting documentation for its actual demand and costs during recent years and designated many of the same issues that were the subject of the investiga-

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[14] *See* Petition of AT&T Corp. on Rate of Return LEC Tariff Filings at 6 (filed, December 23, 1997).

[15] Beehive Reply at 1.

[16] Tariffs Implementing Access Charge Reform, Beehive Telephone Company, CC Docket Nos. 97-250 and 97-249, Memorandum Opinion and Order, DA 97-2724 (Com. Car. Bur., Comp. Pric. Div., rel. Dec. 30, 1997) (*Access Charge Reform Suspension Order*).

tion of Beehive's 1997 annual access tariff.[17] In particular, the Bureau directed Beehive to explain in detail why its ratio of operating expenses to TPIS, reflected in Transmittal No. 8, is significantly higher than its ratio in 1994 and 1995 and to explain in detail why its operating expenses to TPIS ratio in Transmittal No. 8 is significantly higher than the ratio among LECs with a similar number of access lines.[18] The Bureau also directed Beehive to provide detailed cost data for calendar years 1994, 1995, and 1996 in Table 1 of FCC ARMIS Report 43-01 format; provide all investment, expense, and revenue account balances that it is required to keep as a Class B company under Part 32 of the Commission's rules;[19] show the amounts in the access charge categories in Part 69 of the rules;[20] provide its general ledgers for calendar years 1994, 1995, and 1996; provide a detailed list of all its expenses for corporate operations,[21] plant specific

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[17]In the Matter of Beehive Telephone Company, Inc., CC Docket No. 97-249, Order Designating Issues for Investigation, DA 98-502 (Com. Car. Bur. Comp. Pric. Div., released March 13, 1998) (*Beehive Designation Order*).

[18]*Beehive Designation Order* at 4 (para. 9).

[19]Part 32 of the Commission's rules contains the Uniform System of Accounts (USOA) for telecommunications companies, which is a historical financial accounting system that companies use to book costs in their various accounts. The USOA is comprised of different accounts, to which companies book associated costs. 47 C.F.R. Part 32.

[20]Part 69 of the Commission's rules outlines the separations procedures for telecommunications companies to apply to property costs, revenues, expenses, taxes, and reserves as recorded on the books of the company. 47 C.F.R. Part 69.

[21]Corporate Operations Expense accounts must include the costs of performing executive and planning activities, and general and administrative activities described in the narratives for individual accounts. 47 C.F.R. §32.5999(e).

operations,[22] plant nonspecific operations,[23] and customer operations;[24] provide all subsidiary record information for each summary account for corporate operations, plant specific, plant nonspecific, and customer operations expenses required to be kept in accordance with Section 32.12 of our rules;[25] provide information regarding its lease agreements for switching equipment that constitute capital leases[26] or some other type of lease agreement; list all legal expenses included in the general and administrative expenses account, and describe the administrative proceedings or court actions for which Beehive incurred legal costs; and identify the specific costs incurred for each administrative proceeding or court action.

8. The Bureau further directed Beehive to identify all of its nonregulated services, including, but not limited to, any cable, cellular and other wireless services it may offer. Further, the Bureau directed Beehive to show the development of its January 1, 1998 revenue requirement based on its 1995 and 1996 actual costs as adjusted to

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[22] *See* 47 C.F.R. §32.5999(b)(3),(4)(costs to be included as plant specific operations expense).

[23] 47 C.F.R. §32.5999(c)(costs to be included as plant nonspecific operations expense).

[24] 47 C.F.R. §§32.6610, 32.6611-32.6613, and 32.6620.

[25] Section 32.12 of the Commission's rules requires companies to keep financiel records with sufficient particularity to show fully the facts pertaining to all entries in the accounts. This rule also requires companies to maintain financial and subsidiary records in a manner so that the type of information that does not warrant disclosure as an account or subaccount is readily available, and permits ready identification and examination by the Commission.

[26] 47 C.F.R. §32.2681.

reflect the *Universal Service Order*[27] and the *Access Reform Order*,[28] and to show the development of all traffic sensitive rates, including transport and local switching rates, filed in Transmittal No. 8. Because the cost information filed by Beehive in Transmittal No. 8 reflects several additional changes that Beehive made since it filed cost data in support of Transmittal No. 6, the Bureau further directed Beehive to provide an explanation of each change made to the cost data filed for Transmittal No. 6 that is reflected in the cost information filed with Transmittal No. 8 and to state the specific reason for each change.[29]

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[27] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997); First Quarter 1998 Universal Service Contribution Factors Revised and Approved, CC Docket No. 96-45, Public Notice, DA 97-2623 (rel. Dec. 16, 1997).

[28] *Access Charge Reform Order*, 12 FCC Rcd 15982; *Access Charge Reform*, Order on Reconsideration, 12 FCC Rcd 10119 (1997); Second Order on Reconsideration, 12 FCC Rcd 16606 (1997) (collectively, *Access Charge Reform Proceeding*).

[29] *Beehive Designation Order* at 6 (para. 10). On April 3, 1998, Beehive filed a motion requesting an extension of one business day to file its direct case in response to the *Beehive Designation Order*. *See* Beehive Motion for Extension of Time, filed April 3, 1998 (*Beehive Motion*). On April 7, 1998, AT&T filed an opposition to Beehive's motion for an extension of time and requested an extension of time until April 20, 1998 to file its rebuttal. AT&T Opposition to Motion for Extension of Time, CC Docket No. 97-249, filed April 7, 1998 (*AT&T Opposition*). On April 20, 1998, the Bureau granted Beehive's motion for an extension of time to file its direct case and AT&T's request for additional time to file its opposition. *See* In the Matter of Beehive Telephone Company, Inc., CC Docket No. 97-249, Order Designating Issues for Investigation, DA 98-502 (Com. Car. Bur. Comp. Pric. Div., released March 13, 1998) (*Beehive Designation Order*).

III. PLEADINGS

9. In its Direct Case, Beehive states that its accountant did not record its transactions in accordance with Part 32 of the Commission's rules for the years 1994 through 1996.[30] Beehive explains that its ratio of operating expenses to TPIS was significantly higher in 1995 than its ratio in 1994 because of significant increases in its plant specific and corporate operations expenses, specifically attributable to Beehive's efforts to stimulate usage of its system and to its involvement in extraordinary litigation.[31] Beehive provides cost data for 1994, 1995, and 1996 in Table 1 of FCC ARMIS Report 43-01 format and its general ledgers for calendar years 1994, 1995, and 1996.[32] Beehive also submits its subsidiary record information, and provides information regarding its lease agreements, and copies of the lease agreement covering switching equipment.[33]

10. Beehive also includes a list of legal expenses and an explanation of the proceedings for which Beehive incurred legal costs.[34] Beehive's information regarding nonregulated activities includes information about its provision of customer premises wiring and Internet service, but no information regarding any provision of

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[30] Beehive Direct Case at 34-35. Part 32 is a historical and financial accounting system that presents the results of operational and financial events in a manner enabling regulators to assess these results within a specified accounting period. 47 C.F.R. §§32.1 *et sec.*

[31] Beehive Direct Case at 7.

[32] Beehive Direct Case at 13, Exhibit 1.

[33] Beehive Direct Case at 13, Exhibits 2 through 4; *see also* Beehive Supplement to Direct Case.

[34] Beehive Direct Case at 14-31.

cable, cellular, or other wireless service.[35] Beehive also provides cost support information that shows the development of its revenue requirement and local switching rates.[36] Beehive explains that its 1995-1996 data differs from the data filed in support of Transmittal No. 6 for the following reasons: (1) Transmittal No. 6 was erroneously based on cost data for only calendar year 1996 instead of for calendar years 1995 and 1996, the total period since Beehive's last annual filing, as required by Section 61.39(b)(ii) of our rules; and (2) Transmittal No. 6 was based on interstate cost data determined using a weighted DEM jurisdictional separations factor.[37]

11. In its opposition, AT&T contends that Beehive's cost support shows that its expenses are excessive in relation to its investment as a result of a revenue sharing agreement between Beehive and Joy Enterprises, Inc. (JEI), a chat line provider operating in Beehive's service area.[38] AT&T also contends that Beehive has failed to justify nearly all of the legal expenses Beehive claims contribute to its high corporate operations expenses.[39] AT&T states that Beehive's cost support contains numerous entries for which it has provided no explanation and for which it has not met its burden of proof.[40] AT&T argues that the debits and credits in Beehive's general ledgers are an accounting fiction set up to mask the fact that Beehive is the owner of JEI, which generates

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[35] Beehive Direct Case at 32.

[36] Beehive Direct Case at 32, Exhibit 6.

[37] Beehive Direct Case at 33-35.

[38] AT&T Opposition at 3.

[39] AT&T Opposition at 3.

[40] AT&T Opposition at 3.

95 percent of the traffic that terminates in Beehive's territory. AT&T also alleges that Beehive erred in its local switching calculations by using exchange minutes of use rather than total company minutes of use.[41]

12. In its rebuttal, Beehive maintains that its relationship with JEI has allowed Beehive to decrease its access rates.[42] Beehive also disagrees with AT&T's statements regarding its relationship with JEI and with AT&T's claims that Beehive's legal expenses are unjustified.[43] Beehive also provides an explanation for the ledger entries that AT&T found objectionable.[44]

VI. DISCUSSION

13. As noted, Beehive states that its accountant has not maintained its cost accounts and records in accordance with Part 32 of the Commission's rules. Beehive has not explained what accounting procedures were employed, sought to identify specific departures from Part 32, or the extent to which its accounting system may have complied in certain respects with Part 32.

14. Moreover, Beehive's cost data supporting its operating expenses show many inconsistent, questionable, and unexplained entries. For example, Account 6728, Other General and Administrative Expenses, which under normal Part 32 accounting would include only expenses incurred to perform general administrative activities not directly charged to the user and not provided for in other accounts,[45] includes payments to

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[41] AT&T Opposition at 13.

[42] Beehive Rebuttal at 3.

[43] Beehive Rebuttal at 6, 7.

[44] Beehive Rebuttal at 20.

[45] *See* 47 C.F.R. §32.6728.

dentists, florists, toy stores, the Immigration and Naturalization Service, and the Internal Revenue Service.[46] Beehive has not explained these entries.

15. Beehive's cost information also shows numerous unexplained or inadequately explained entries relating to JEI that aise serious questions regarding whether Beehive's proposed rates are based on costs legitimately related to the provision of interstate access service. For example, the record shows substantial, inadequately explained payments to JEI. Prior to 1995 Beehive compensated JEI for stimulation of traffic at a rate of four cents per minute of traffic originating from JEI or about $1.2 million per year.[47] Subsequently, this payment terminated, but in 1996 a new charge arose of $84,000 per month, or approximately $1 million annually for the leasing of switches from JEI.[48] Beehive has submitted a copy of a lease agreement, but this agreement has few of the normal terms and conditions of an operating lease, such as a term and descriptions of the switches or capabilities that will be provided. As another example, Beehive's general ledgers for its Utah company in 1995 includes $1,194,110.24 in expense paid to JEI posted to Account 7990 (Nonregulated Net Income), an income account.[49] Subsequently, at the end of 1995, Beehive

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[46] Beehive's Utah general ledger for 1995 contains entries such as $5540 for the Step Higher clinic, $25,000 for Fran Brothers, $30,000 for Fran Brothers, $20,000 for Fran Brothers, $1727 for Aaron Goldberg, DDS, $75 for the Immigration and Naturalization Service, $1016.42 for Delta Airlines, and $868 for Aeroflot Airlines.

[47] AT&T Opposition at 4; Beehive Rebuttal at 6.

[48] Beehive Direct Case at 9.

[49] *See* 47 C.F.R. §32.7990. The instructions for Account 7990 states that the account "shall be used by those companies

[footnote continued]

divided this amount and transferred it to three expense accounts, and then consolidated it and transferred it to yet another account, Account 6540 (Access Expense).[50] Under Part 32, Account 6540 is used for "amounts paid by interexchange carriers or other exchange carriers to another exchange carrier for the provision of access service."[51] Beehive has failed to provide any explanation for this accounting treatment or how any expense associated with JEI could legitimately be for payment by Beehive for provision of access by JEI.

16. Beehive also recorded other payments to JEI in Account 5082 (Access Revenue).[52] Beehive's general ledger for its Utah company reflect debits attributable to JEI which are subsequently nullified by credits in various amounts.[53] Beehive explains these entries as corrections, but it is not clear why these entries for JEI should appear in Beehive's regulated accounts at all or why they were posted as debits when entries to a revenue account are normally posted as credits.[54] As a whole, these entries raise substantial questions of whether Beehive's apparent lack of a regular accounting system leaves ratepayers

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who offer nonregulated activities that do not involve the use of assets or resources used in the provision of both regulated and nonregulated products and services, and which have not established a separate subsidiary for that purpose." Amounts recorded in Account 7990 represents the net of total revenues and total expenses for such activities.

[50] Beehive Direct Case at 7. See 47 C.F.R. §32.6124, General Purpose Computer; 47 C.F.R. §32.6212, Digital Electronic Switching; 47 C.F.R. §6728, General and Administrative; 47 C.F.R. §32.6540, Access Expense.

[51] 47 C.F.R. §32.6540.

[52] Beehive Rebuttal at 5.

[53] AT&T Opposition at 5.

[54] Beehive Rebuttal at 5.

unprotected from paying imprudent expenses or expenses unrelated to regulated interstate access service. Beehive has not provided any explanation for its relationship with JEI that would rebut concerns raised by its accounting treatment of JEI-related costs.

17. Beehive has additionally failed to show that its litigation expenses should be recovered from ratepayers. It claims that its corporate operating expenses rose in 1995 partly because of its involvement in extraordinary litigation.[55] It states that its legal expenses rose from $274,872 in 1994, to $672,992 in 1995, and then dropped to $272,459 for 1996.[56] These expenses constitute 35.43% of the increase in Beehive's operating costs from 1994 and approximately 20.26% of Beehive's total operating costs for 1995.

18. Under the *Other Litigation Costs Order* Beehive is entitled to a rebuttable presumption that all litigation costs "arise out of events occurring in the normal course of providing service to ratepayers, and that ratepayers benefit from provision of service."[57] The presumption may be overcome by evidence that the proceeding was illegal, duplicative, or unnecessary.[58] We find that this presumption is rebutted in several instances by Beehive's own explanation of the nature of the litigation

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[55] Beehive Direct Case at 7.

[56] Beehive Direct Case at 32. We note that a large portion of Beehive's legal expenses are classified as miscellaneous expenses. For example, Beehive's data shows miscellaneous expenses amounting to $11,349.19 in 1994 and $23,637.71 in 1995. *See id.* at Attachment 4.

[57] Accounting for Judgments and Other Costs Associated with Litigation, CC Docket No. 93-240, Report and Order, 12 FCC Rcd 5112, 5144 (1997) (para. 56) (*Other Litigation Costs*).

[58] *Other Litigation Costs*, 12 FCC Rcd at 5144.

expense. Nor has Beehive otherwise shown that these expenses benefited ratepayers.

19. For example, Beehive seeks to recover in its proposed interstate access charges $562,946 in legal expenses for "shareholder" litigation that its description reveals primarily to be a defense to a property claim that arose from a divorce action filed against Beehive's president, Art Brothers, by Frances Gaines Brothers. Beehive also seeks to recover $51,601 for a breach of contract case brought against Beehive by James E. Ball concerning benefits from an educational trust. These cases do not show any relationship to Beehive's provision of interstate access service to its ratepayers and, thus, the associated legal expenses should not be recovered in Beehive's rates. Beehive also seeks to recover approximately $12,615 in legal expenses for its lawsuit against the City of Wendover and the Federal Aviation Administration in which Beehive sought to lease space at the airport so that Beehive could construct a heated airport hanger for its aircraft. Although Beehive may require aircraft to respond to service outages and customer complaints, as it contends in its direct case and rebuttal,[59] we find that litigation regarding the construction of a heated hanger does not necessarily arise in the ordinary course of providing telecommunications service. Beehive also seeks to recover $204,775 for its lawsuit against US West regarding the Hanksville exchange. In this litigation, Beehive contested the decision of US West to sell the Hanksville exchange to the South Central Utah Telephone Cooperative Association. We do not believe that this litigation was necessary to Beehive's provision of service to its existing ratepayers.

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[59] Beehive Direct Case at 23; Beehive Rebuttal at 19.

20. Beehive has additionally not adequately explained its net investment costs. It has not explained why its net investment is approximately 55% higher than the net investment of companies with a comparable number of access lines as Beehive.[60] Further, it has not sought to reconcile its net investment claimed in this investigation with net investment claimed in previous proceedings, or explained why it has changed.[61]

21. Under 201(a)(1), carriers bear the burden of demonstrating in a tariff investigation that the proposed rates are reasonable. As part of meeting this burden, carriers developing rates based on costs will ordinarily do so based on books and accounts maintained in accordance with Part 32 of the Commission's rules. Under Part 32, local exchange carriers will maintain investments, revenues, and expenses associated with tariffed telecommunications products and services in specific accounts. Recording costs in specified accounts then serves as the basis for regulatory treatment of those costs as specified in other sections of the Commission rules, including identification of nonregulated costs under Part 64, separation of costs between interstate and state jurisdictions under Part 36, and development of interstate access charges under Part 69. Beehive has chosen not to justify its rates using Part 32 in this way, nor has it provided any other explanation of its accounting treatment of costs that could provide assurance that its costs are presented and identified in a way that would permit

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[60] See Table 2.

[61] Reply of Beehive to AT&T's Opposition, CC Docket No. 97-237 at 8-9 (filed, December 29, 1997)(Beehive stated that it also purchased fiber optic cable which its plant investment did not reflect).

development of lawful interstate access charges. This circumstance, combined with the inconsistencies in its costs presented, the questionable entries, its unexplained treatment of costs associated with JEI, and its unjustified legal expenses persuade us that Beehive has failed to meet the burden of justifying its rates in this investigation. We note that these concerns affect all its proposed rates because its unexplained accounting system and its claimed operating costs and net investment are used to support all its proposed traffic sensitive rates.[62] Accordingly, we will prescribe rates for these services.[63]

22. We find additionally that we are not able to base a prescription on any of the operating expense or net investment figures submitted by Beehive. Without an explanation of its system of accounting, if it has employed one, and in light of the other concerns discussed above, we are not persuaded that we could, with any

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[62] For purposes of this investigation, we will assume that Beehive is not a carrier fully subject to Title II of the Act, but is only subject to Sections 201-205, because presumably it only provides interstate service through interconnection with other carriers. *See* 47 U.S.C. §152(b)(2). Thus, Beehive is not subject to our prescription of Part 32 pursuant to Sections 219 and 220 of the Act that is applicable to fully subject carriers. 47 U.S.C. §§219, 220. We do not here prescribe or require Beehive to comply with Part 32 as a general matter of company operations. We merely find that it has not met its burden to justify its proposed rates because it has not presented costs in accordance with Part 32, has not demonstrated that it records costs and revenues in a manner that allows compliance with Parts 64, 36, and 69 of our rules, and has not otherwise adequately explained its accounting system.

[63] Our investigation of Beehive's 1997 access rates only concerned its rates for local switching. Consequently, we prescribed rates for local switching in that investigation but did not otherwise examine the sufficiency of Beehive's accounting practices generally or with respect to rates that were not subject to that investigation.

degree of certainty, determine that any rates based on Beehive's expenses and investments, as reported here, are just and reasonable. We will therefore disregard the cost and investment information that Beehive has filed in support of its 1998 access tariff filing and base our prescription on costs of comparable companies as described immediately below.

23. We prescribe Beehive's rates by computing a total interstate revenue requirement based on the average total plant in service and net investment of similar companies using the same sample of comparable telephone companies in NECA that we used in our 1997 access tariff investigation.[64] We then compute the ratio of this revenue requirement to the total interstate revenue requirement reported in Beehive's Direct Case. The prescribed rates are then computed by multiplying each of Beehive's filed rates by this ratio. Under this approach we preserve the manner in which Beehive has allocated its costs between interstate and intrastate services and among the various traffic sensitive services. We additionally use Beehive's reported interstate minutes of use.

24. Accordingly, as set forth in Table 1 attached hereto, we prescribe Beehive's interstate revenue requirement by first multiplying 25 percent ratio of total expense to total plant in service, by the sample's average unseparated total plant in service of $3,773,709.[65] We derived the 25 percent factor by first calculating the average total operating expense to total plant in service ratio among LECs with a comparable number of access lines as Beehive.[66] That ratio was 21.55 percent. To account for the

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[64] *See infra* text at paragraph 4 and accompanying note 9.

[65] See Table 1, line 1.

[66] *See infra* text at paragraph 4.

possibility that Beehive is a high cost carrier, we used an expense to total plant in service ratio of 25%. This is the same approach we used in our investigation of Beehives 1997 access rates to calculate its expenses for purposes of our prescription, except that we now rely on the sample's average total plant in service, instead of Beehive's data, because we have found the Beehive data unreliable. The resulting operating expenses of $943,427 are multiplied by the interstate allocation factor of 0.6234, which is based on Beehive's reported ratio of interstate to total company plant in service (for 1995 and 1996).[67] This results in the allowable interstate operating expenses of $588,130.[68] The total company return on investment is calculated by multiplying the maximum authorized rate of return of 11.25% by the average interstate net investment for the companies in the NECA sample of $2,244,584.[69] We multiply the resulting total allowed return of $252,516 by 0.4678, the ratio of Beehive's reported interstate net plant to total net plant, to compute allowed interstate return of $118,128.[70] The allowed interstate return is allocated between the two states for income tax purposes by the percent of net plant in each state.[71] This produces taxable income of $96,624 in Utah and $21,504 in Nevada.[72] Beehive reports average interstate fixed charges of $10,499 in Utah, and these are subtracted from $118,128 to calculate the interstate return subject to taxes, $107,629, of which $86,125 is allo-

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[67] Table 1, line 6.

[68] Table 1, line 7.

[69] Table 1, line 10.

[70] Table 1, line 14.

[71] Table 1, line 11a.

[72] Table 1, line 14a.

cated to Utah.[73] Allowance for federal and Utah income taxes are computed,[74] and Beehive's average interstate customer operations expenses are added to form the total allowed interstate revenue requirement of $824,965.[75] The ratio of allowed to reported interstate revenue requirement is 0.3401, which we multiply by Beehive's filed rates to calculate the prescribed rates.[76]

25. Based on these calculations, we prescribe for Beehive a premium local switching rate of $0.009607 per minute of use and a non-premium local switching rate of $0.004323 per minute of use. We prescribe a premium local transport facility rate of $0.000181 per mile per minute of use and a non-premium local transport facility rate of $0.000082 per mile per minute of use. For Beehive's local transport termination, we prescribe a premium local transport termination rate of $0.009179 and a non premium local transport termination rate of $0.004116. We will require Beehive to refund with interest the difference between these prescribed rates and the actual rates charged during the course of this investigation.

26. We find that prescribing rates that are based on the average cost and investment of companies with a comparable number of access lines as Beehive is consistent with our authority under Section 205(a) of the Act. Section 205(a) provides in pertinent part that, whenever "after full opportunity for hearing . . . the

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[73] Table 1, line 16.

[74] Table 1, lines 17 and 18.

[75] We note that the NECA Universal Service Fund data excludes customer operations expenses and also that Nevada does not have state income tax.

[76] Table 1, line 22.

Commission shall be of opinion that any charge . . . of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge."[77] As noted in our previous orders where a similar methodology has been successfully implemented,[78] courts have consistently found in the Act a Congressional intent to grant us broad discretion in "selecting methods . . . to make and oversee rates."[79] Courts, and federal agencies with authority to prescribe and oversee rates similar to our own, evaluate whether an established regulatory scheme produces rates that fall within a "zone of reasonableness" rather than insisting upon a single method of determining whether rates are just and reasonable.[80]

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[77] 47 U.S.C. §205(a).

[78] *Beehive Tariff Investigation Order, Transmittal No. 6* at 8 (paras. 18, 19, 21), Table 1.

[79] *Permian Basic Area Rate Cases*, 390 U.S. 747 (1968). *See MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982), *quoting Aeronautical Radio v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). *See also, Western Union Int'l v. FCC*, 804 F.2d 1280, 1292 (D.C. Cir. 1986) (the court stated that the FCC's judgment about the best regulatory tools to employ in a situation is entitled to considerable deference from the "generalist" judiciary.); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 259 (1983) (We stated that a prescribed rate is just and reasonable under Section 205(a) if its represents the best approximation of a rate that satisfies all of the statutory requirements that this Commission can devise within a reasonable period of time.).

[80] *See e.g., FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *AT&T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988), *quoting, Jersey Cent. Power & Light v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987). *See also Wisconsin v. FPC*, 373 U.S. 294, 309 (1963); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942).

V. CONCLUSION AND ORDERING CLAUSES

27. For the reasons stated herein, WE FIND that the rates subject to this investigation and identified in this Order, of Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada are unlawful.

28. IT IS ORDERED that Beehive Telephone Company shall file tariffs within five business days of the release date of this Memorandum Opinion and Order, establishing the premium and non-premium local switching, local transport facility, and local transport termination rates prescribed herein.

29. Accordingly, IT IS FURTHER ORDERED that pursuant to Sections 4(i), 201(b), 203, 204(a), and 205(a) of the Communications Act, 47 U.S.C. §§4(i), 201(b), 203, 204(a), 205(a), Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada SHALL REFUND to its access customers with compounded daily interest, the difference between the actual local switching, local transport facility, and local transport termination revenues they obtained between January 1, 1998 and the effective date of tariffs filed in response to this order for each rate element and the local switching, local transport facility, and local transport termination revenues that they would have obtained during this period based on rates prescribed in this Memorandum Opinion and Order. Interest shall be computed on the basis of interest specified by the United States Internal Revenue Service.

30. IT IS FURTHER ORDERED that Beehive Telephone Company must submit its plans for issuing refunds to the Common Carrier Bureau for review and approval pursuant to our delegation of authority under Section 0.291 of the Commission's rules, 47 C.F.R. §0.291,

within 30 calendar days of the release date of this Memorandum Opinion and Order.

31. IT IS FURTHER ORDERED that pursuant to Section 204(a) of the Communications Act, 47 U.S.C. §204(a), the investigation instituted by the Common Carrier Bureau in CC Docket No. 97-249 for Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, Transmittal No. 8 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Table 1: Traffic Sensitive Rate Prescription Methodology for Beehive Telephone Company January 1, 1998 Rates
(See Table 2 for development of Combined data)

Line	(a)	Utah (b)	Nevada (c)	COMBINED (d)
1	Total Plant in Service – Prescribed (Average of similar-sized companies)			$3,773,709
2	Prescribed Oper. Exp. to Investment Ratio			0.2500
3	Allowed Total Operating Expenses (TOE) (Ln. 2 * Ln. 1)			$943,427
4	Reported TOE (Total 1995, 1996)			$6,873,667
5	Reported Interstate TOE (Total 1995, 1996)			$4,285,022
6	Ratio of Reported Interstate to Total TOE (Ln. 5/Ln. 4)			0.6234
7	Allowed Interstate Oper. Exp. (Ln. 3 * Ln. 6)			$588,130
8	Average Net Investment –Prescribed (Average for similar-sized companies)			$2,244,584
9	FCC Authorized Rate of Return			11.25%
10	Total Return on Invstmt (Ln. 8 * Ln. 9)			$252,516
11	Reported Net Plant (Total 1995, 1996)	$5,563,362	$1,428,614	$6,991,976
12	Reprtd Interstate Net Plant (Total 1995, 1996)	$2,675,434	$595,434	$3,270,868

(continued)

Table 1: Traffic Sensitive Rate Prescription Methodology for Beehive Telephone Company January 1, 1998 Rates
(See Table 2 for development of Combined data)

Line	(a)	Utah (b)	Nevada (c)	COMBINED (d)
12a	Percent of total by State	81.80%	18.20%	100.00%
13	Ratio of Interstate to Total Net Plant	(Ln. 12/Ln. 11)		0.4678
14	Interstate Return on Invstmnt (ln 10 * Ln. 13)			$118,128
14a	Interstate Return by State (Ln. 14 * Ln. 12a)	$96,624	$21,504	
15	Interstate Fixed Charges (Avg. 1995, 1996)	$10,499	$0	$10,499
16	Interstate Return Subject to Fed. Inc. Tax (Ln. 14 - Ln. 15, allocated by Ln. 11a)	$86,125	$21,504	$107,629
17	Federal Inc. Tax @ 34% (Ln. 16 * 0.51515)	$44,367	$11,078	$55,445
18	State Inc. Tax (rate * (Ln. 16 + Ln. 17))	$6,525	$0	$6,525
19	Customer Oper. Services (Avg. 1995, 1996)			$56,738
20	Allowed Interstate Revenue Requirement (Lns.7+14+17+18+19)			$824,965
21	Reported Interstate Rev. Reqmnt	(Avg. 1995, 1996)		$2,425,982
22	Ratio of Allowed to Reported Rev. Reqmnt			0.3401

(continued)

	Filed	Prescribed
Rates (Ln.22 * Filed Rates)		
Local Switching – Premium	0.028252	0.009607
Local Switching – Non-Premium	0.012714	0.004323
Premium Local Transp. Facility per MOU per Mile	0.000533	0.000181
Non-Prem. Local Transp. Facility per MOU per Mile	0.000240	0.000082
Premium Local Transp. Termination	0.026992	0.009179
Non-Premium Local Transp. Termination	0.012105	0.004116

Table 2: Worksheet for Development of Combined Totals and Averages – Beehive Telephone Company
Source: Direct Case Filed April 6, 1998, Exhibit 6

	Utah	Nevada	Combined
Reported Total Oper. Expenses	1995 $3,335,666	$270,931	$3,606,597
Reported Total Oper. Expenses	1996 $2,994,631	$272,439	$3,267,070
Reported Total Oper. Expenses	Total $6,330,297	$543,370	$6,873,667
Reported Interstate TOE	1995 $2,162,914	$165,357	$2,328,271
Reported Interstate TOE	1996 $1,847,565	$109,186	$1,956,751
Reported Interstate TOE	Total $4,010,479	$274,543	$4,285,022
Reported Total Net Plant	1995 $2,700,843	$678,834	$3,379,677
Reported Total Net Plant	1996 $2,862,519	$749,780	$3,612,299
Reported Total Net Plant	Total $5,563,362	$1,428,614	$6,991,976
Reported Interstate Net Plant	1995 $1,258,166	$333,805	$1,591,971
Reported Interstate Net Plant	1996 $1,417,268	$261,629	$1,678,897
Reported Interstate Net Plant	Total $2,675,434	$595,434	$3,270,868

(continued)

Table 2: Worksheet for Development of Combined Totals and Averages – Beehive Telephone Company
Source: Direct Case Filed April 6, 1998, Exhibit 6

		Utah	Nevada	Combined
Customer Operations Services	1995	$28,720	$6,450	$35,170
Customer Operations Services	1996	$71,469	$6,836	$78,305
Customer Operations Services	Total			$113,475
Average of 1995 & 1996				$56,738
Interstate Fixed Charges	1995	$9,523	$0	$9,523
Interstate Fixed Charges	1995	$11,474	$0	$11,474
Interstate Fixed Charges	Total	$20,997	$0	$20,997
Average of 1995 & 1996		$10,499	$0	$10,499
Reported Interstate Rev. Reqmnt	1995	$2,382,239	$221,499	$2,603,738
Reported Interstate Rev. Reqmnt	1996	$2,094,448	$153,778	$2,248,226
Reported Interstate Rev. Reqmnt	Total			$4,851,964
Average of 1995 & 1996				$2,425,982

APPENDIX B

[FCC 98-241]

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 97-249
Beehive Telephone Company, Inc.	)	
Beehive Telephone, Inc. Nevada	)	
	)	Transmittal No. 8
Tariff F.C.C. No. 1	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1998;
Released: September 28, 1998

By the Commission:

1. The Commission has before it a Petition for Reconsideration filed on June 30, 1998 by Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (*Beehive*).[1] Beehive seeks reconsideration of a June 1, 1998 order by the Commission prescribing rates for Beehive's interstate access services.[2]

---

[1] Beehive Petition for Reconsideration (filed, June 30, 1998). *See also* AT&T Opposition to Petition for Reconsideration (filed, July 15, 1998); Beehive Reply to Opposition to Petition for Reconsideration (filed, July 27, 1998).

[2] Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, Transmittal No. 8, CC 97-249, Memorandum Opinion and Order, 12 FCC Rcd 12275 (1998).

2. Beehive presents no new facts or arguments that would lead us to change the decisions that we made in the Memorandum Opinion and Order. We therefore affirm our decision for the reasons stated therein.

3. Accordingly, IT IS ORDERED, that the petition for reconsideration filed on June 30, 1998 by Beehive Telephone Company, Inc. IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX C

[Filed Oct 28 1999]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1999

No. 98-1467

Beehive Telephone Company, Inc. and
Beehive Telephone Co. Inc. Nevada,

Petitioners

v.

Federal Communications Commission and
United States of America,

Respondents

AT&T Corporation,

Intervenor

BEFORE: Wald, Silberman and Randolph, *Circuit Judges*

ORDER

This case was heard on the record from the Federal Communications Commission and on the briefs filed by the parties. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. See D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the petition for review be dismissed. See Beehive Telephone Co., Inc. v. FCC (D.C. Cir. 1999). It is

FURTHER ORDERED that the motion for leave to file a supplemental brief be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Cheri Carter
Cheri Carter
Deputy Clerk

APPENDIX D

[Filed Apr 24 2000]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1999

No. 98-1467

Beehive Telephone Company, Inc. and
Beehive Telephone Co. Inc. Nevada,

Petitioners

v.

Federal Communications Commission and
United States of America,

Respondents

AT&T Corporation,

Intervenor

BEFORE: Silberman and Randolph, Circuit Judges*

ORDER

Upon consideration of petitioners' petition for rehearing filed December 13, 2000, it is

ORDERED that the petition be denied.

---

*Former Circuit Judge Wald was the third member of the panel.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

[Filed Apr 24 2000]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1999

No. 98-1467

Beehive Telephone Company, Inc. and
Beehive Telephone Co. Inc. Nevada,

Petitioners

v.

Federal Communications Commission and
United States of America,

Respondents

AT&T Corporation,

Intervenor

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Henderson did not participate in this matter.

APPENDIX F

EXCERPTS FROM THE COMMUNICATIONS ACT OF 1934

47 U.S.C. §204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and deci-

sion may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

* * * *

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

* * * *

47 U.S.C. §402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

* * * *

47 U.S.C. §405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons there-

for, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

APPENDIX G

EXCERPTS FROM THE HOBBS ACT

§2342. Jurisdiction of the Court of Appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of–

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

* * * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of–

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency.

The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

APPENDIX H

EXCERPTS FROM THE ADMINISTRATIVE PROCEDURE ACT

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that–

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * * *

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. * * *

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions, found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX I

RULE 15(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

(a) **Petition for Review of Order; Joint Petition.** Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" will include agency, board, commission, or officer) must be obtained by filing with the clerk of a court of appeals that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency must be named respondent. The United States will also be a respondent if required by statute, even though not designed in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

APPENDIX J

RULE 36(b) OF THE CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Circuit Rule 36

Decisions of the Court; Opinions and Abbreviated Dispositions

* * * *

(b) **Abbreviated Dispositions.** The court may, while according full consideration to the issues, dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision or judgment of a court or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. If the parties have agreed to such disposition, they may so state in their briefs or may so stipulate any time prior to decision. In any such case the court will promptly issue a judgment unless compelling reasons otherwise dictate.

(2)

Supreme Court, U.S.
FILED
SEP 22 2000
CLERK

No. 00-128

IN THE

SUPREME COURT OF THE UNITED STATES

BEEHIVE TELEPHONE COMPANY, INC., and
BEEHIVE TELEPHONE CO., INC. NEVADA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, Beehive Telephone Company, Inc. and Beehive Telephone Co. Inc. Nevada (collectively "Beehive") submit this supplemental brief to call this Court's attention to the decision of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") in *Anastasoff v. United States*, No. 99-3917EM, 2000 WL 1182813 (8th Cir. Aug. 22, 2000) (App. A-1).

STATEMENT

In *Anastasoff*, a panel of the Eighth Circuit ruled that its "unpublished decisions" must be recognized and applied as binding precedent. The Eighth Circuit declared unconstitutional that portion of 8th Circuit Rule 28A(i), which provides that "[u]npublished opinions are not precedent and parties generally should not cite them." As the court stated:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. . . . This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.

App. A-3-4.

The Eighth Circuit found this "doctrine of precedent" to be a limitation on the judicial power conferred on the courts by Article III of the Constitution. Rule 28A(i) exceeded that limitation by giving the court the power to determine which judicial decisions will bind it and which will not. The rule was struck down insofar as it would allow the court to avoid the precedential effect of its prior decisions. *See id.* A-15.

ARGUMENT

Beehive challenges Rule 36(b) of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") as it was applied in this case to mask the unconstitutional denial of Beehive's right to judicial review. *See* Pet. 15-19. D.C. Cir. Rule 36(b) is also unconstitutional insofar as it expands the judicial power beyond the bounds of Article III as found by the Eighth Circuit in *Anastasoff.*

D.C. Cir. Rule 36(b) authorizes the D.C. Circuit to "dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate." Pet. App. 47a. Like the unpublished opinions of the Eighth Circuit, the unpublished orders or judgments of the D.C. Circuit may not be cited as precedent. *See* D.C. CIR. R. 28(c) (App. A-17). By permitting the court to dispense with publication, D.C. Cir. Rule 36(b) gives the court the discretion to determine which of its decisions will bind it. Consequently, Rule 36(b) suffers the same constitutional infirmity found in 8th Cir. Rule 28A(i). However, Rule 36(b) has a pernicious effect beyond that of the rule struck down in *Anastasoff.*

In addition to affording the court the discretion to determine whether its action will be a binding precedent *in futuro,* Rule 36(b) invites the D.C. Circuit to depart from existing precedent by allowing the court to dispense with a statement of its reasons. As Judge Arnold noted prior to authoring the *Anastasoff* opinion, judges wishing to reject a precedent for some extraneous reason "can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser." Richard S. Arnold, *Unpublished Opinions: A Comment,* 1 J. APP. PRAC. & PROCESS 219, 223 (1999). Although

Judge Arnold did not state that judges actually use that device, the present case testifies to the unfortunate fact that abbreviated dispositions under Rule 36(b) enable the D.C. Circuit to disregard precedent and to treat similar cases differently. Witness the refusal of the D.C. Circuit to apply its "intent-to-appeal" test announced in *Southwestern Bell Tel. Co. v. FCC*, 180 F.3d 307, 313-14 (D.C. Cir. 1999) to determine the sufficiency of Beehive's petition for review in the case below.

Beehive and the Federal Communications Commission ("FCC") both recognized *Southwestern Bell* as the controlling precedent. *See* Pet. 7-8. Both parties urged the court to apply the intent-to-appeal test. *See id.* 17. Nevertheless, the court in *Beehive* declined to abide by its precedent. It dismissed Beehive's petition for review without explanation, merely citing a prior decision not involving the *Southwestern Bell* test. *See Beehive Tel. Co., Inc. v. FCC*, No. 98-1467, 1999 WL 1006310 (D.C. Cir. Oct. 28, 1999) (per curiam) (Pet. App. 32a-33a).[1]

Beehive's treatment below shows how D.C. Cir. Rule 36(b) serves to defeat the doctrine of precedent. On

---

[1] When it waived its right to file a response to the petition in this case, the Government provided the Court with the opinion in *Beehive Tel. Co., Inc. v. FCC*, 180 F.3d 314 (D.C. Cir. 1999) ("*Beehive I*"). Like Beehive, the Government assumed that the *Beehive* panel was referring to *Beehive I*. However, while it was decided on the same day as *Southwestern Bell*, *Beehive I* did not involve the intent-to-appeal test. Moreover, adherence to *Southwestern Bell* would have required an examination of Beehive's petition for review and its subsequent filings in this particular case. *See* 180 F.3d at 313. Even if Beehive's intent to appeal were determined in *Beehive I*, that determination would have little precedential significance with respect to Beehive's intention as manifested by its submissions in this case.

October 15, 1999, the *Beehive* panel, on its own motion, ordered that the case be considered and decided on the briefs. *See* App. A-19. Six days later, two members of the *Beehive* panel (Judges Wald and Randolph) served on the three-judge panel of the D.C. Circuit that applied the *Southwestern Bell* intent-to-appeal test in the unpublished memorandum accompanying its judgment in *Isley v. Executive Office for the United States Attorneys*, No. 98-5098, 1999 WL 1021934 (D.C. Cir. Oct. 21, 1999) (per curiam) (App. A-20). The panel in *Isley* held that the appeal in the case encompassed orders of the trial court that were not referenced in the notice of appeal. The panel looked beyond the notice of appeal and found an intent to appeal the orders at issue manifested in the appellant's motion for appointment of counsel. *See* App. A-24-26.

Just one week after *Isley* was decided, the *Beehive* panel (including Judges Wald and Randolph) concluded that the issue of whether Beehive's petition for review encompassed both of the FCC's orders below "occasion[ed] no need for a published decision" under Rule 36(b). Pet. App. 32a. It summarily dismissed Beehive's petition for review (and declined to accept Beehive's supplemental brief addressing *Southwestern Bell* as controlling precedent). *See* Pet. 8; Pet. App. 33a. As shown by its citation of "Beehive Telephone Co., Inc. v. FCC (D.C. Cir. 1999)," the panel acted without regard to the *Southwestern Bell* test.[2] It apparently concluded that Rule 36(b) allowed it to depart from *Southwestern Bell*, and to act contrary to what was done just one week before in *Isley*, without stating its reasons or distinguishing the cases.

---

[2] *See supra* note 1.

That the D.C. Circuit employed Rule 36(b) to treat similar cases differently is evidenced further by decisions the court made during the four months it considered Beehive's petitions for a rehearing of this case. In those four months, the D.C. Circuit published five opinions that applied the *Southwestern Bell* test to determine whether an appeal encompassed an agency order not designated in the petition for review or notice of appeal. *See* Pet. 17-18. Nevertheless, both the court en banc and the *Beehive* panel refused to revisit Beehive's case under *Southwestern Bell* or to explain why the case was dismissed. *See id.* 8-9.

Rule 36(b) allowed the court in *Beehive* to disregard the doctrine of precedent and the "most basic principle of jurisprudence" that judges "must act alike in all cases of like nature." *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). To paraphrase the analogy used in *Anastasoff*, the D.C. Circuit said to Beehive: "We may have decided this question the opposite way last week, but this does not bind us today, and, what's more, you cannot even tell what we did today because we won't tell you." *See* App. A-14. And, as the Eighth Circuit explained, "such a statement exceeds the judicial power, which is based on reason, not *fiat*." *Id.*

To summarize, Rule 36(b) violates Article III in two basic ways. First, the rule empowers the D.C. Circuit to determine which judicial decisions will bind it. Second, by allowing decisions by fiat, the rule allows the D.C. Circuit to dispose of cases in a manner unfathomable to the litigants, the bar, and ultimately to this Court. Either way, Rule 36(b) is wholly inconsistent with the doctrine of precedent that limits the power of Article III courts. This Court should hold that all decisions of the courts of appeal must have precedential effect, whether

published or not, and be accompanied at least by a brief statement of the court's reasoning.

Finally, it has long been argued that rules such as Rule 36(b) "reduce judicial accountability" and "allow difficult issues to be swept under the carpet." *National Classification Comm. v. United States,* 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J., concurring). It has been suggested that, as a practical matter, parties have little chance of prevailing on a petition for rehearing en banc in the D.C. Circuit, or on a petition for certiorari in this Court, when review is sought of an unpublished decision with "no precedential effect and no opinion to highlight the issues and reasoning of the court." *Id.* at 174. That proved true when Beehive petitioned the D.C. Circuit to rehear this case en banc. *See* Pet. App. 36a. We trust that it will be otherwise in this Court.

CONCLUSION

Based upon the foregoing, Beehive's petition for a writ of certiorari should be granted and D.C. Circuit Rule 36(b) should be declared unconstitutional insofar as it allows the D.C. Circuit to depart from the law set out in its prior decisions without any statement of the reasons to differentiate the cases.

Respectfully submitted,

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APPENDIX AA

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 99-3917EM

FAYE ANASTASOFF,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 8, 2000
Filed: August 22, 2000

Before RICHARD S. ARNOLD and HEANEY, Circuit Judges, and MAGNUSON,[1] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Faye Anastasoff seeks a refund of overpaid federal income tax. On April 13, 1996, Ms. Anastasoff mailed her refund claim to the Internal Revenue Service for

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[1] The Hon. Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

taxes paid on April 15, 1993. The Service denied her claim under 26 U.S.C. §6511(b), which limits refunds to taxes paid in the three years prior to the filing of a claim. Although her claim was mailed within this period, it was received and filed on April 16, 1996, there years and one day after she overpaid her taxes, one day late. In many cases, "the Mailbox Rule," 26 U.S.C. §7502, saves claims like Ms. Anastasoff's that would have been timely if received when mailed; they are deemed received when postmarked. But §7502 applies only to claims that are untimely, and the parties agree that under 26 U.S.C. §6511(a), which measures the timeliness of the refund claim itself, her claim was received on time. The issue then is whether §7502 can be applied, for the purposes of §6511(b)'s three-year refund limitation, to a claim that was timely under §6511(a). The District Court[2] held that §7502 could not apply to any part of a timely claim, and granted judgment for the Service. On appeal, Ms. Anastasoff argues that §7502 should apply whenever necessary to fulfill its remedial purpose, i.e., to save taxpayers from the vagaries of the postal system, even when only part of the claim is untimely. We affirm the judgment of the District Court.

I.

We rejected precisely the same legal argument in *Christie v. United States*, No. 91-2375MN (8th Cir.Mar. 20, 1992) (per curiam) (unpublished). In *Christie*, as here, we considered a refund claim mailed just prior to §6511(b)'s three-year bar and received just after. Like Ms. Anastasoff, the *Christie* taxpayers argued that §7502 should operate regardless of the claim's timeliness under §6511(a) to save their claim under §6511(b). We held

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[2]The Hon. Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

that even if §7502 could apply to a timely claim, it would not help in this situation: If §7502 were applied to the claim, it would be deemed received before the return. But §6511(a) provides that a claim must be submitted within two years of overpayment if no return has yet been filed–not three years. In other words, to save the claim under §6511(b) only makes it untimely under §6511(a). Ms. Anastasoff does not attempt to distinguish *Christie*. She does argue that a relevant regulation was not cited in *Christie*, but the reasoning of the *Christie* opinion is squarely inconsistent with the effect taxpayer desires to attribute to the regulation.

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the "judicial."

The Rule provides:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. . . .

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases

to similarly situated parties. *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 544 (1991); *Cohens v. Virginia,* 6 Wheat. 264, 399 (1821). These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution.[3] Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional. That rule does not, therefore, free us from our duty to follow this Court's decision in *Christie.*

II.

The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. Morton J. Horwitz, *The Transformation of American Law: 1780-1860* 8-9 (1977); J. H. Baker, *An Introduction to English Legal History* 227 (1990); Sir William Holdsworth, *Case Law,* 50 L.Q.R. 180 (1934). See, *e.g.,* 1 Sir William W. Blackstone, *Commentaries on the Laws of England* *69 (1765) ("it is an established rule to abide by former precedents"). To the jurists of the late eighteenth century (and thus by and large to the Framers),[4] the doctrine

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[3] "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1, cl. 1.

[4] Lawyers made up majorities of the Continental Congress, the signers of the Declaration of Independence, and the Framers of the Constitution. Perry Miller, *The Legal Mind in America* 16 (1962).

seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law.[5] In addition, the Framers had inherited a very favorable view of precedent from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government.[6] In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.

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[5]James Wilson suggested that the doctrine of precedent was brought to England by the Romans. 1 *The Works of James Wilson* 343 (1967). Chancellor Kent traced it "from the earliest periods of English history." James Kent, *Commentaries on American Law* 473-78 (12th ed. 1873). Blackstone found it "even so early as the conquest." 1 William Blackstone, *Commentaries* *69. Before them, in *Slade v. Morley*, Sir Edward Coke suggested simply that "precedents have always been respected . . . ." 4 Co. Rep. 91, 76 Eng. Rep. 1074 (K.B. 1602), reprinted in *Sources of English Legal History: Private Law to 1750* 428 (1986).

[6]Coke's struggle against the tyranny of the Stuarts, which the Framers identified with their own against King George, made him the legal authority most admired and most often cited by American patriots. Bernard Bailyn, *The Ideological Origins of the American Revolution* 30 (1967). Coke used precedent, and emphasized it to a greater degree than his predecessors, because it was his main weapon in the fight for the independence of the judiciary and limits on the king's prerogative rights. See Harold J. Berman and Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 450 (1996); J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* 46 (1987). By contrast, the only criticism of the doctrine of precedent was associated with Thomas Hobbes, who regarded the authority of precedent as an affront to the absolute power of the Sovereign. See Thomas Hobbes, *Leviathan* 323-26 (Penguin ed. 1985).

Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds.[7] By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself.[8] As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. 3 Blackstone, *Commentaries* *25. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule. . . ." 1 *Commentaries* *69.[9] In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges "to determine law" in each case, a judge is "sworn to deter-

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[7] See, *e.g.*, Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 595-602 (1987) (noting that the authority of precedent is commonly supported by arguments: (1) from fundamental fairness, i.e., that like cases should be treated alike; (2) from the need for predictability; and (3) as an aid to judicial decision-making, to prevent unnecessary reconsideration of established matters).

[8] Blackstone's great influence on the Framers' understanding of law is a familiar fact. See *Schick v. United States*, 195 U.S. 65, 69 (1904) ("At the time of the adoption of the Federal Constitution, it [Blackstone's work] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it."); Daniel Boorstin, *The Mysterious Science of Law* 265 (1941).

[9] This need not be done by way of a reported opinion. The record of the judicial proceedings and decision alone is sufficient evidence of the legal principles necessary to support the decision to provide "light or assistance" when "any critical question arises." 1 Blackstone, *Commentaries* *69.

mine, not according to his own judgements, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old." *Id.* The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "best and most authoritative" guide of what the law is, the judicial power is limited by them. *Id.* The derivation of precedential authority from the law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale. See 4 E. Coke, *Institutes of the Laws of England* 138 (1642) (a prior judicial decision on point is sufficient authority on a question of law because "a judicial decision is to the same extent a declaration of the law."); 1 Coke, *Institutes* 51 (1642) ("[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."); Sir Matthew Hale, *The History of The Common Law of England* 44-45 (Univ. of Chicago ed., 1971) ("Judicial Decisions [have their] Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is . . . .").

In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, *Commentaries* *258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose deci-

sions would be then regulated only by their own opinions . . . ." *Id.* at *259.

The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it.[10] Hamilton, like Blackstone, recognized that a court "pronounces the law" arising upon the facts of each case.[11] *The Federalist No. 81,* at 531 (Alexander Hamilton) (Modern Library ed., 1938). He explained the law-declaring concept of judicial power in the term, "jurisdiction": "This word is composed of JUS and DICTIO, *juris dictio,* or a speaking and pronouncing of the law," *id.,* and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role of juries. *Id.* Like Blackstone, he thought that "[t]he courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. *The Federalist No. 78* 507-08. Like Black-

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[10]See Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in *The Mind of the Founder: Sources of the Political Thought of James Madison* 390, 390-93 (Marvin Meyers ed., rev. ed. 1981) (describing the "authoritative force" of "judicial precedents" as stemming from the "obligations arising from judicial expositions of the law on succeeding judges . . . ."); James Wilson, II *The Works of James Wilson* 502 (1967) ("judicial decisions are the principal and most authentick" proof of what the law is and . . . "every prudent and cautious judge will appreciate them [because] . . . his duty and his business is not to make the law, but to interpret and apply it." *Id.* See also Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* 74 (1986); David M. O.Brien, *Constitutional Law and Politics* 73 (1995).

[11]James Wilson agreed: "judicium is quasi juris dictum . . . a judgment is a declaration of the law." II *The Works of James Wilson* 524 (1967).

stone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power. *Id.* at 508. Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ." *Id.* at 510.[12]

The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases. Hamilton anticipated that the record of federal precedents "must unavoidably swell to a very considerable bulk. . . ." *Id.* But precedents were not to be recorded for their own sake. He expected judges to give them "long and laborious study" and to have a "competent knowledge of them." *Id.* Likewise, Madison recognized "the obligation arising from judicial expositions of the law on succeeding judges." Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in *The Mind of the Founder: Sources of the Political*

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[12]Other early authorities confirm the connection between the doctrine of precedent and the separation of powers. See 1 *Kent's Commentaries*, Lect. XXI at 479: "Those nations, which have adopted the civil law as the main foundation of their own [recognize precedent to a far less degree than our own] . . . . With them the necessity of judiciary independence upon the executive, is not so clearly acknowledged. . . . It has been shown already that this independence requires, in a considerable degree, the acknowledgment of precedential authority."; William Cranch, Preface, 1 Cranch iii (1804): "In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge . . . perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public."

Thought of James Madison 390, 390-93 (Marvin Meyers ed., rev. ed. 1981). Madison expected that the accumulation of precedents would be beneficial: "[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents." Letter from James Madison to Samuel Johnson (June 21, 1789), in *12 Papers of James Madison* 250 (Robert A. Rutland et al. eds., 1977). Although they drew different conclusions from the fact, the Anti-Federalists also assumed that federal judicial decisions would become authorities in subsequent cases.[13] Finally, early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters in the years following the ratification of the Constitution. Grant Gilmore, *The Ages of American Law* 23 (1977); Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth-Century America* 28-32 (1997).

We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial decisions was the rule, and they never

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[13] See, *e.g.*, Essays of Brutus, XV (Mar. 20, 1788) in 2 *The Complete Anti-Federalist*, 441 (Herbert J. Storing ed., 1981): "one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them." By contrast, the danger in the Federal Farmer's view was that the federal courts had "no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion." Letters from The Federal Farmer No. 3 (Oct. 10, 1787), in 2 *The Complete Anti-Federalist* at 244.

drew that practice into question. Before the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800-1850,* 3 Am. J. Leg. Hist. 28, 34 (1959) (reviewing the history of American reports). As we have seen, however, the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. Although they lamented the problems associated with the lack of a reporting system and worked to assure more systematic reporting, judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum. Karsten, *Heart Versus Head* 30; Jesse Root, *The Origin of Government and Laws in Connecticut* (1798), reprinted in *The Legal Mind in American* 38-39 (Perry Miller ed., 1962).[14]

To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice

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[14]In this, they were following the common-law view, which considered entry on the official court record sufficient to give a decision precedential authority whether or not the decision was subsequently reported. See, *e.g.*, Coke, 2 *Institutes,* Proeme, last paragraph (stating that judicial decisions are reliable authority whether they are published, i.e., "related and reported in our Bookes," or only "extant in judicial Records. . . ."). This remained true even after reporting became more systematic. See James Ram, *Science of Legal Judgement* (1834) ("A manuscript note of a case is authority. It may be more full, or accurate, than a printed report of the same case. The existence of such manuscript may be little known. When cited by a party in a cause . . . it may be 'an authority precisely applicable' (18 Ves. 347); but the opposite party, or the Court, may never have heard of it before; it may then come as a great surprise upon both.").

(despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III. No less an authority than Justice (Professor) Joseph Story is in accord. See his *Commentaries on the Constitution of the United States* §§377-78 (1833):

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
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> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to

tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

III.

Before concluding, we wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. We point out, in addition, that "unpublished" in this context has never meant "secret." So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled "published" or not, available to anyone on line. This is true of our Court.

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system

is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not *fiat*.

Finally, lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

IV.

For these reasons, we must reject Ms. Anastasoff's argument that, under 8th Cir. R. 28A(i), we may ignore our prior decision in *Christie*. Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992). The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts "have always required a departure from precedent to be supported by some 'special justification.' " *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996), quoting *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring). Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

Ms. Anastasoff's interpretation of §7502 was directly addressed and rejected in *Christie*.[15] Eighth Cir. R.

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[15]On July 28, 2000, the Second Circuit decided *Weisbart v. United States Dep't of Treasury*, 2000 WL 1041231 (2d Cir. July 28, 2000). *Weisbart* appears to conflict with *Christie*. We express no view on whether we would follow *Weisbart* if it were not for the conclusive effect of *Christie*.

28A(i) does not free us from our obligation to follow that decision. Accordingly, we affirm the judgment of the District Court.

HEANEY, Circuit Judge, Concurring.

I agree fully with Judge Arnold's opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions. I write separately only to state that in my view, this is a case which should be heard en banc in order to reconsider our holding in *Christie*, and thus resolve an important issue.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX BB

RULE 28(c) OF THE CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Circiut Rule 28

Briefs

* * * *

(c) **Citation to Unpublished Disposition.** Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, are not to be cited as precedent. The same rule applies to unpublished dispositions of district courts, and to unpublished dispositions of other courts of appeals if those appellate courts have a rule similar to this one. Counsel may refer to an unpublished disposition, however, when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant. In that event, counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited therein. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

APPENDIX CC

[Filed Oct 15 1999]

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit
September Term, 1999

No. 98-1467

Beehive Telephone Company, Inc. and
Beehive Telephone Co. Inc. Nevada,

Petitioners

v.

Federal Communications Commission and
United States of America,

Respondents

AT&T Corporation,

Intervenor

BEFORE: Wald, Silberman and Randolph, *Circuit Judges*

ORDER

Upon consideration of the briefs and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purpose of Rule 34(j) of the General Rules of this Court and also meets one or more of the criteria set forth in that Rule, it is

ORDERED, by the Court, that the above case will be considered and decided without oral argument.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Cheri Carter
Cheri Carter
Deputy Clerk

APPENDIX DD

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 98-5098

EDWARD ISLEY,

Appellant,

v.

EXECUTIVE OFFICE FOR THE UNITED STATES ATTORNEYS, DEPARTMENT OF JUSTICE and FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE,

Appellees.

Oct. 21, 1999

Appeal from the United States District Court for the District of Columbia (No. 96cv00123).

Before WALD, HENDERSON and RANDOLPH, Circuit Judges.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia, the briefs filed by the parties, and oral argument held on September 15, 1999. The Court has determined that the issues presented occasion no need for a published

opinion. See D.C.Cir. R. 36(b). For the reasons stated in the accompanying Memorandum, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court is affirmed in part and remanded in part as set out in the Memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely-filed petition for rehearing. See D.C. Cir. Rule 41(a).

MEMORANDUM

On June 2, 1994, Edward Isley ("appellant") submitted a Freedom of Information Act ("FOIA") request to the Executive Officer for United States Attorneys ("EOUSA") seeking documents relating to a 1984 criminal trial in the United States District Court for the Eastern District of Virginia in which appellant was convicted for conspiracy to commit the murder of a fellow inmate at the Lorton Reformatory in Lorton, Virginia. On July 18, 1995, the EOUSA notified appellant that his request had been processed, and released six pages of documents, two of which were redacted. The EOUSA withheld 389 pages in their entirety and advised appellant that FOIA exemptions 3, 5, 6, 7(C), 7(D), and 7(F), as well as section 552(j)(2) of the Privacy Act had been applied to all or part of the withheld material. The EOUSA also referred appellant's request and 12 pages of documents that had originated with the Federal Bureau of Investigation ("FBI") to the FBI for processing. On November 6, 1995, appellant submitted a FOIA request directly to the FBI seeking information regarding third parties without mentioning them by name. On February 20, 1997, the FBI notified appellant that it had identified 215 pages of records it deemed rele-

vant and that it was releasing 180 of the pages to appellant. All 12 pages referred from the EOUSA as well as 31 other pages originating with the FBI were withheld in their entirety, and redactions were made to the documents that were released. pursuant to FOIA exemptions 6, 7(C) and 7(D).

On January 26, 1996, appellant filed suit in the United States District Court for the District of Columbia seeking an order compelling the EOUSA and the FBI to provide him with relevant withheld documents. Both the EOUSA and the FBI filed motions for summary judgment. On March 27, 1997, the district court granted partial summary judgment to the EOUSA only, holding that the EOUSA was justified in withholding documents pursuant to FOIA exemptions 5, 6, 7(C), 7(D) and 7(F). However, the district court concluded that the EOUSA had not sustained its burden of showing that it was entitled to withhold documents under exemption 3 and ordered the EOUSA to either provide additional justification for its action or release information withheld under exemption 3 alone. After supplemental briefing, the district court on June 11 issued an order granting the EOUSA's motion for summary judgment in full, stating that it was a final order from which appellant had 60 days to appeal.

On April 7, 1997, appellant filed a notice of appeal of the district court's order granting the EOUSA partial summary judgment, and this court issued an order to show cause why the appeal should not be dismissed as premature in light of the fact that the district court had not decided whether the EOUSA properly invoked exemption 3. Appellant subsequently filed a notice of appeal of the district court's order granting summary judgment to the EOUSA in full and moved this court to

dismiss his April notice of appeal and replace it with his July 1, 1997 notice. On August 25, 1997, appellant moved to dismiss the July 1 notice of appeal until the district court ruled upon appellant's FOIA complaint against the FBI or in the alternative stay the appeal pending the outcome of the FBI complaint. On September 8, 1997, this court obliged both of appellant's requests to dismiss, by dismissing both the April and July notices of appeal.

On February 20, 1998, the district court granted the FBI's motion for summary judgment, holding that the FBI made a sufficient showing to warrant summary judgment on FOIA exemptions 6, 7(C) and 7(D). On March 23, 1998, appellant filed a notice of appeal from the order of the district court granting the FBI's motion for summary judgment. The March 23 notice of appeal did not make any reference to the orders of the district court granting summary judgment to the EOUSA.

A.
Whether the District Court's Orders Concerning the EOUSA Are Included in the Appeal.

Despite the government's argument that appellant's notice of appeal does not encompass the judgment against the EOUSA and so we cannot consider that part of the trial court's judgment, we find that this appeal does encompass the order granting summary judgment to the FBI as well as the orders in favor of the EOUSA. A notice of appeal which is technically defective due to an error in designating the judgment appealed from should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from appellants' submissions, and appellees were not prejudiced by the notice of appeal. See South-

western Bell Telephone Co. v. FCC, 180 F.3d 307, 313 (D.C. Cir. 1999) (citing Brookens v. White, 795 F.2d 178, 180 (D.C. Cir. 1986)); Fed. R. App. P. 3(c)(4) (1999) ("an appeal must not be dismissed for informality of form ot title of the notice of appeal").

The Supreme Court has held that although a notice of appeal of a district court order dismissing a case while motions to vacate and amend pleadings were pending, was premature, a subsequent notice of appeal which mentioned only the motion to vacate, still constituted "an effective, although inept, attempt to appeal from the judgment sought to be vacated." Foman v. Davis, 371 U.S. 178, 181 (1962). This case is virtually identical to Foman. As in Foman, appellant here filed two notices of appeal which respectively stated that he was appealing the orders of the district court which granted summary judgment to the EOUSA. See Foman, 371 U.S. at 179. We dismissed the notices of appeal as premature in light of the fact that the district court had not yet ruled on the claims against the FBI. Yet, the premature notices of appeal read in conjunction with this appeal from the judgment against the FBI, evidence a clear intent to appeal from both the order granting summary judgment to the FBI and the earlier orders granting summary judgment to the EOUSA. Therefore, as the Supreme Court did in Foman, we treat the later notice of appeal at issue as an "effective, although inept, attempt to appeal" from all three orders of the district court.

Appellant's motion for appointment of counsel filed three weeks before the docketing statement also manifests an intent to appeal the district court's decisions to grant summary judgment to the EOUSA. Appellant states in that motion that he "is appealing two decisions pertaining to his FOIA civil complaint . . . derive[d] from the district court granting the FBI and

EOUSA summary judgment." Appellees were served with copies of this motion.

The Supreme Court has held that it is the notice afforded by a document alone which determines the document's sufficiency to give notice of appeal. See Smith v. Barry, 502 U.S. 244, 248 (1992). In Brookens, this court declared that an intent can be inferred from appellant's submissions and looked beyond the notice of appeal to the filed docketing statement before concluding that there was no intent to appeal an order. See 795 F.2d at 180-81; see also Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan, 835 F.2d 881, 889 (D.C. Cir. 1987) (holding appellant's Rule 10(b)(1)(B) certificate to the court stating that no transcript would be ordered was sufficient as a notice of appeal because it plainly revealed an intent to appeal the order at issue). In this case, the motion for appointment of counsel, like the docketing statement in Brookens, gave effective notice of appeal.

Finally, appellees were not prejudiced by appellant's defective notice of appeal. Appellee EOUSA asserts that had it known that appellant intended to appeal the EOUSA orders, the EOUSA would have been better able to defend the district court's judgment in its favor at the summary affirmance stage. First, EOUSA was put on sufficient notice to avoid prejudice at that stage under Foman by appellant's previous notices of appeal of the EOUSA orders. See 371 U.S. at 181. Second, appellant's motion for appointment of counsel was filed one month before the motion for summary affirmance was filed and was served on the EOUSA, and appellees' certificate of counsel lists EOUSA as a party. In toto, appellant's filings are sufficient to maintain an appeal

of the orders granting summary judgment to the EOUSA as well as the FBI.

B.
Appellees' Claims of FOIA Exemption

This court reviews orders granting summary judgment de novo. See Computer Prof'ls for Soc. Responsibility v. United States Secret Serv., 72 F.3d 897, 902 (D.C. Cir. 1996). In a FOIA case, the agency must sustain its burden of demonstrating that the documents requested are exempt from disclosure under the FOIA. See id. (citing Gallant v. NLRB, 26 F.3d 168, 171 (D.C. Cir. 1994)); 5 U.S.C. §552(a)(4)(B) (1994).

1. Allegation that Prior Publication of Documents and Information Precludes Withholding Documents.

We first address the exemption claimed by the government under 7(C) since that exemption was invoked by both the EOUSA and the FBI for every piece of information withheld from appellant. In addition, we address the claims of exemption under 7(D), upon which the agencies also substantially relied to withhold information. Since exemptions 7(C) and 7(D) are themselves sufficient to cover all of the documents withheld, we need not address the validity of any other exemptions.

Exemption 7(C) permits an agency to withhold a document only if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). Appellant claims that the documents at issue are already in the "public domain" because in response to a 1986 FOIA request he received many of them and he proffers a receipt of the documents obtained from the EOUSA at that time. He

also refers to Bailey, Allison and Richardson's testimony at appellant's trial which he says waived the government's right to withhold specific information about matters as to which they testified. However, this court has already noted that the status of the "public domain" doctrine has been changed, if not eradicated,[1] by the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). See Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992). As the public domain doctrine stands today, a party can only gain access to information withheld by the government under a FOIA exemption if it can "point to 'specific' information identical to that being withheld" that is publicly available. Davis, 968 F.2d at 1280.

As far as the documents received from the prior FOIA request are concerned, appellant has not demonstrated that those documents continue to be "freely available" in any "permanent public record." Presumably they are not since appellant is invoking FOIA to obtain them. But, more importantly, appellant has not shown that the documents from the 1986 FOIA request have ever been replicated in public documents or in any other "permanent public record" which would indicate that they are freely available. See Davis, 968 F.2d at 1280. In Reporters Committee, the Court held that the privacy interest in maintaining the "practical obscurity" of documents which have at one time been

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[1]Specifically, this court noted that the Supreme Court rejected the proposition that simply because material has been made public at one time, it should be thought permanently in the public domain, even though it has since become "practically obscure." See Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (citing Reporters Committee, 489 U.S. at 762-71).

disclosed, outweighs the FOIA-based public value of additional disclousre. See 489 U.S. at 779.

Nor does the testimony of Allison, Bailey and Richardson at trial place all documents relating to their testimony in the public domain. Rather, under Davis, the fact that they testified only bars the government from withholding the testimony itself. See 968 F.2d at 180. Since appellant has not requested the trial testimony of Allison, Bailey and Richardson nor has he otherwise pointed to specific information, identical to that being withheld, which is freely available, his claim that the government is barred from invoking exemption 7(C) to withhold documents pertaining to the subject matter of that testimony fails.

2. Claims Under Exemptions 7(C) and 7(D)

Of course, the inquiry does not end here. Even if appellant cannot show that FOIA exemptions are inapplicable under the public domain doctrine, the government has the burden to show that the documents withheld fall within an exemption. The affidavits submitted by the EOUSA and the FBI state that the purpose behind exemption 7(C) was to protect the privacy interests in the names and other personal information of special agents, government employees, local law enforcement officials, witnesses and other third-party individuals in the case. This court has recognized that interviewees, witnesses and investigators have a substantial privacy interest against harassment, embarrassment or damage to their reputations from being associated with criminal activity. See Computer Prof'ls, 72 F.3d at 904 (D.C. Cir. 1996) (citing McDonnell v. United States, 4 F.3d 1227, 1255 (3d Cir. 1993)); Nation Magazine v. United States Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995);

Dunkelberger v. United States Dep't of Justice, 906 F.2d 779, 781 (D.C. Cir. 1990).

The other FOIA exemption upon which the EOUSA and the FBI principally rely is 7(D).[2] Exemption 7(D) exempts records or information compiled by a criminal law enforcement authority in the course of a criminal investigation so long as it is "information furnished by a confidential source." 5 U.S.C. §552(b)(7)(D). A source is usually deemed confidential on a case-by-case basis according to whether the source furnished information with the understanding that the communication would not be divulged except as necessary for law enforcement purposes. See United States Dep't of Justice v. Landano, 508 U.S. 165, 172, 174 (1993). However,

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[2]The EOUSA relied on exemption 7(D) in withholding a signed, sworn and witnessed handwritten statement by a third party with information regarding the murder; a letter from the prosecutor to the parole board dated 9/26/84 regarding third party's cooperation with prosecutors; a 9/27/84 letter from prosecutor to parole board providing personal information omitted from 9/26/84 letter; handwritten notes of the prosecutor of statements made by third parties regarding the terms and conditions of confinement; handwritten notes of the prosecutor in preparation for use in direct questioning of third parties regarding investigation of murder; handwritten notes of the prosecutor regarding personal information of third parties and information obtained in murder investigations; and handwritten notes of prosecutor made in preparation for use at murder trial and containing mental impressions from direct and cross-examinations of third parties. All of these documents were withheld in full. The documents withheld by the FBI under exemption 7(D) are interviews by the FBI of inmates and witnesses to the murder at the Lorton Reformatory where Isley was an inmate, and six pages of information provided by local law enforcement officers which were compiled by Lorton Reformatory staff as part of its initial investigation into the murder and given to the FBI as part of a cooperative effort.

depending on the character of the crime at issue and the source's relation to the crime, there are other narrowly defined circumstances that will also support an inference of confidentiality. See id. at 179.

The affidavits submitted by the EOUSA and the FBI both state that although there was no express agreement of confidentiality in this case, the nature of the crime – a murder and conspiracy among prisoners – and the relation of the sources to the crime – fellow prisoners and prison officials – support an inference of confidentiality in this case. The district court held that these factors constituted "generic circumstances in which an implied assurance of confidentiality fairly can be inferred." Landano, 508 U.S. at 179.

The district court was correct. The Supreme Court in Landano itself used as an example of a circumstance which would warrant an inference of confidentiality the risk of reprisal when a source inside a prison gives information about a crime by another person in the prison. See 508 U.S. at 180. (citing Parton v. United States Dep't of Justice, 727 F.2d 774, 776-77 (8th Cir. 1984) (prison officials who provided information about alleged attack on inmate faced "high probability of reprisal")); see id. (citing Nix v. United States, 572 F.2d 998, 1003-04 (4th Cir. 1978) (guards and prison inmates who informed on guards who allegedly beat another inmate supported a finding of implied assurance of confidentiality)). Therefore, under Landano this case presents one of the "narrowly defined circumstances" where an inference of confidentiality is appropriate.

3. Allegation That Agencies May Not Withhold Information Under Exemption 7(C) Because Appellant Has Submitted Compelling Evidence of Prosecutorial Misconduct

Finally, appellant asserts that the district court erred in concluding that FOIA exemption 7(C) applies because appellant has shown strong evidence of prosecutorial misconduct. But allegations of government misconduct are not enough unless the requesting party sets forth "'compelling evidence that the agency denying the FOIA request is engaged in illegal activity' and shows that the information sought is 'necessary to confirm or refute that activity.'" See Davis, 968 F.2d at 1282 (quoting SafeCard Servs. Inc. v. SEC, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991)). Appellant submitted excerpts from the prosecutor's closing argument stating that Allison and Bailey were not offered any inducements to testify as well as letters from the prosecutor written weeks after the trial recommending Allison and Bailey to the D.C. Parole Board. Appellant asserts that this evidence constitutes compelling evidence that the EOUSA has engaged in the illegal activity of concealing from the jury inducements provided to important witnesses in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).

The requirement that appellant set forth compelling evidence that an agency has engaged in illegality is a stringent one. In fact, this court has never found that a requesting party has presented sufficient evidence to satisfy the compelling evidence standard. See, e.g., Spirko v. United States Postal Service, 147 F.3d 992, 999 (D.C. Cir. 1998) (allegations and evidence submitted that Postal Service withheld exculpatory evidence at trial); Quinon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996)

(allegations that judge engaged in obstruction of justice in investigation); Computer Prof'ls, 72 F.3d at 904 (allegations that Secret Service illegally broke up meeting); McCutchen v. United States Dep't of Health and Human Servs., 30 F.3d 183, 189 (D.C. Cir. 1994) (appellant submitted newspaper articles asserting that the Office of Scientific Integrity was mishandling scientific misconduct investigations).

None of the actions by the prosecutor here compel a conclusion that there was an agreement with Bailey or Allison to make a recommendation for leniency to the parole board in exchange for their testimony. First, the prosecutor's letter written after trial to the parole board asked for an early release for Allison precisely because Allison cooperated "without an agreement for anything in return"; this refutes appellant's assertion that there was an agreement beforehand and is consistent with the prosecutor's representation at trial that Allison had, at that point, received nothing in return for his cooperation. Second, although the prosecutor's post-trial letter to the parole board recommending that it take Bailey's cooperation into account in determining a parole eligibility date may be technically inconsistent with the prosecutor's statements at trial that Bailey is "not going on work release any earlier than if he had not testified" and with the government's statement in an earlier parole board letter that it would not recommend time cuts, the letter post-trial does not contradict the prosecutor's main thrust in his statement to the jury that "Bailey . . . told the FBI about this murder before [he] got promises from the Government." And despite any inconsistency, the subsequent parole board letter gives no indication that the prosecutor's recommendation was part of a pretrial agreement with Bailey. In essence, the fact that the prosecutor chose to reward Bailey

after trial for his contributions to a successful prosecution, standing alone, is not compelling evidence of an agreement beforehand to do so. The evidence of misconduct submitted in this case is in the end no more reliable than the newspaper articles submitted in McCutchen, which reported that the Office of Scientific Integrity was mishandling investigations into scientific misconduct. See 30 F.3d at 189. Both submissions lack direct evidence which would convincingly show some act of misconduct by an agency.

4. Appellant's Claim That Segregable Information Was Not Released

The district court did err in not making a finding regarding the segregability of the documents withheld by the EOUSA and the FBI. FOIA dictates that "any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. §552(b). The segregability requirement applies to all documents and all exemptions in the FOIA. Krikorian v. Department of State, 984 F.2d 461, 466 (D.C. Cir. 1993). Although appellant concedes that it did not raise the issue of segregability in the court below, and appellee claims appellant did not even raise the issue properly before us, this court has concluded that segregability must be addressed regardless of whether a party raises it. See Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. Jun. 1, 1999); Public Citizen Health Research Group v. FDA, 185 F.3d 898, 907 (D.C. Cir. 1999). In any event, we find appellant did allege in his brief in our court that appellees failed to properly segregate portions of documents that were not covered under FOIA exemptions from exempted material. Therefore, this case must be

remanded to the district court to determine if there is information in the documents withheld which can be segregated and disclosed to appellant.

C. The Reasonableness of the Agency's Search

On appeal, appellant raises for the first time the issue whether a genuine issue of material fact exists regarding the reasonableness of the search conducted by the EOUSA and the FBI. Because the matter was never presented to the district court, appellant is barred in this case from pursuing the matter on appeal. See Felch v. Air Florida, Inc., 866 F.2d 1521, 1525 (D.C. Cir. 1989).

CONCLUSION

For the foregoing reasons, we hold that the orders granting summary judgment in favor of the EOUSA and the FBI are encompassed in this appeal. Further, we affirm the decision of the district court that the EOUSA and the FBI properly invoked FOIA exemptions 7(C) and 7(D). However, since the district court did not make determine whether any unprotected information is segregable from protected information in the documents withheld, we remand to the district court, for such a finding.